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LIBER V

De bonis Ecclesiae temporalibus

BOOK V

The Temporal Goods of the Church

INTRODUCTION

Mariano López Alarcón

I. The title "*De bonis Ecclesiae temporalibus*" is the same as the title of the sixth part of *Liber* III of *CIC*/1917. In the *CIC* working drafts, the term used today by the majority of authors,[1] "*De iure patrimoniali Ecclesiae*,"[2] was being used up to the time the *Coetus studiorum* introduced the new term.[3] The new term was kept in the *Schema canonum Libri V* (in 1977) because, according to the majority opinion of the *Coetus*, "the word *patrimony* seems to suggest the idea of vast Church possessions.[4] But this argument is not convincing, for the fact is that the patrimony of the Church's juridical persons is actually small and it is normal to refer to

1. Cf., e.g., A. MOSTAZA, "Derecho patrimonial canónico," in *Derecho canónico* (Pamplona 1975), pp. 315ff; P. FEDELE, *Lezioni de Diritto patrimoniale canonico* (Rome 1977); K. MÖRSDORF, "Kirchliches Vermögensrecht," in *Lehrbuch des Kirchenrechts*, II (Munich 1967), pp. 492ff; D. FALTIN, *De Iure patrimoniali Ecclesiae* (Rome 1973).
2. *Comm.* 5 (1973), p. 94.
3. *Comm.* 12 (1980), p. 394.
4. Ibid.

personal or family or professional patrimony to express modest accumulations of wealth and rights that are protected by public authority.[5] It is indeed correct to say that a juridical person has a right to its patrimony—an organized body of goods and rights to serve the purposes of the entity. Or as García Barberena writes, citing Wernz, the Church's patrimony includes "everything temporal, tangible or intangible under the Church's power that is intended by Church authority for its own use and purposes."[6] The *CIC* refers to patrimonial funds (cc. 531, 1274 § 3, 1275) and to special patrimonial funds (c. 1274 §§ 1 and2). The *CIC* also assumes that every public juridical person has a stable patrimony (cc. 1285, 1291). The *CIC*'s conception of patrimony is implicit in the detailed regulation of the financial office, councils of economic affairs, and administrative activity.

II. Patrimonial law as a branch of the main body of laws includes "the norms and basic institutions of economic organization or, what amounts to the same thing, the norms and institutions by which the purposes of attribution, use, marketing, or trade in economic goods are achieved, and the social cooperation that some people may achieve for or in the service of other persons."[7] This meaning was adopted in canonical doctrine by Prof. Giménez Fernández, who used the term "economic canon law," although his purpose was merely to juxtapose the Church's social doctrine and *CIC*/1917's norms on the Church's patrimonial goods.

Canonical patrimonial law should deal with both the static aspect of the attribution of the goods and the dynamics of patrimonial distribution of and trade in goods, cooperation through services, and administration of both the preservation and the use of patrimonial property.

The attribution of goods to subjects, or rather to canonical juridical persons, follows a dual governance: the governance established for public juridical persons, governed by canonical norms, and the governance given in laws and statutes as the proper governance for private juridical persons. However, the following *CIC* norms are common to both classes of juridical persons: norms on objectives (c. 1254 § 2), on the patrimonial authority of the Roman Pontiff (c. 1256), rights over goods (c. 1257 § 1), canonical legal powers (c. 1257 § 2), and individuals subject to canonical taxes (c. 1263). Generally, juridical persons are subject to discipline by the bishop to avoid abuses in administering goods (c. 392 § 2).

The distribution of goods must be such as to achieve the purposes of the Church, in particular the following: support public worship, fittingly support the clergy and other ministers, and carry out the work of the sacred apostolate and charity, especially among the needy (c. 1254 § 2).

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5. Cf. L. DE ECHEVERRÍA, commentary on c. 1254, in *Salamanca Com*; A. MOSTAZA, *Derecho patrimonial*, in *Nuevo Derecho Canónico* (Madrid 1983), p. 423.
6. T. GARCÍA BARBERENA, "Patrimonio eclesiástico," in *Gran Enciclopedia Rialp*, XVIII (Madrid 1974), p. 65.
7. M. GIMÉNEZ FERNÁNDEZ, *Instituciones jurídicas de la Iglesia católica*, II (Madrid 1942), pp. 3ff.

Trading in goods (acquisition, exchange, alienation) is referred to the corresponding norms of civil law (cc. 1255, 1259 and1290, among others).

And finally, the administration of goods, with its complex content on preservation, use, management, and income-producing possibilities, is governed by canonical norms with remissions and references to civil law in a broad, comprehensive sense and also to business, finance, and labor law (e.g., cc. 1284 and 1286).

This economic and juridical-patrimonial activity is integrated into the Church's administrative organization, with jurisdictional vigilance and control functions by the authorities when exercised over juridical persons, more strictly and with more content when exercised over public entities. The Church's financial organization, both structurally and functionally, is the most important and peculiar aspect of patrimonial law. It is here where the reforms introduced by the *CIC* have been most felt.[8]

In sum, canonical patrimonial law is the framework of a nonprofit economic system of mediation. The system is based on acquisitions and income which must be preserved, managed productively, and spent in fulfillment of designated ecclesiastical purposes in a way that is suitable to the public or private status of the juridical person owning the goods.

III. The basic norms supporting universal patrimonial law are found together in *Liber* V and also in numerous precepts dispersed throughout the *CIC* for systematic reasons that are not always right. For a more complete repertory of the law of goods, in addition to the canons in *Liber* V, the following must also be taken into account:

— cc. 121–123: Destination of goods belonging to juridical persons in cases of modification or extinction of the juridical persons

— c. 222: Duty of the faithful to help the Church in its needs

— c. 231: Remuneration for services rendered by lay people

— c. 264: Levies benefitting seminaries

— cc. 285 and 286: Prohibitions directed to the clergy in patrimonial matters

— c. 319: On goods belonging to public associations

— cc. 325 and 326: On goods belonging to private associations

— c. 392 § 2: Bishop's duty to oversee administration of goods

— cc. 492–494: Diocesan finance committees and financial administrators

— c. 510 § 4: Presumption of parochiality of alms

8. Cf. T. MAURO, "Gli aspetti patrimoniali dell'organizzazione ecclesiastica," in *Il nuovo Codice di Diritto Canonico* (Bolonga 1983), p. 208.

— cc. 531 and 551: Offerings in favor of parish funds

— c. 532: Parish priest's care in administering the patrimony

— c. 537: Parish council on financial affairs

— c. 584: Destination of goods in case of suppression of an institute of consecrated life

— c. 616: Destination of goods in case of suppression of a lawfully established religious house or an autonomous nunnery

— cc. 634–640: On temporal goods of religious institutes and their administration

— c. 668: Goods belonging to members of a religious institute before their first profession

— c. 668: Patrimonial statute for nuns and monks

— c. 702: Patrimonial consequences of departure or dismissal of nuns and monks

— c. 718: Goods belonging to secular institutes

— c. 741: Goods belonging to societies of apostolic life

— c. 848: Offerings for administering the sacraments

— cc. 945–958: Offerings for celebrating a mass

— c. 1181: Offerings upon the occasion of funerals

— cc. 1205–1233: Sacred places

— c. 1419 § 2: Judicial competence

— c. 1715: Settlements and compromise on temporal goods.

— c. 1741 § 5: Bad administration of goods is cause for removal of the parish priest.

This scattered distribution of canons does not substantially impair regulation by *Liber* V of the fundamentals of the canonical patrimonial system, by following certain precedents found mainly in *CIC*/1917 and certain principles emanating from Vatican Council II and by applying the modern techniques of framework laws that are open to incorporating other norms of private and civil law into the general system.

Some have opined that this codified patrimonial law is inadequate and inapplicable.[9] It is so, indeed, unless it is evaluated at its true meaning: the formulation of certain constitutive principles and basic norms which form the framework of patrimonial law; the establishment of universal governance of the Church's goods and patrimony; and with extensive openings, the legitimization of private law and civil law. The *CCEO*,

9. H. SCHMITZ, "Das kirchliche Vermögenrecht als Aufgabe der Gesamtkirche und der Teilkirchen," in *Archiv für katholisches Kirchenrecht* 146 (1977), p. 8.

promulgated on October 18, 1990, has been constructed along the same lines.[10]

IV. The special character of patrimonial law within canon law was recognized in the *CIC* when patrimonial law was assigned a book, just as it had already appeared in the provisional *Schema* (in 1968)[11] and was retained in the first final Schema.[12] Both *Schemas* were prepared by the *Coetus "De ordinatione systematica Codicis,"* and the rank and order were retained as *Liber* V up until the *CIC*. In addition, the *Coetus "De iure patrimoniali Ecclesiae,"* initially called *"De bonis Ecclesiae temporalibus,"* began work in 1967 and brought out a *relatio* that presents the order and content proposed for writing *Liber* V. The *Coetus* stated the reasons behind the modifications, suppressions, and additions that were to be introduced in *CIC*/1917 for writing the new *Schema.*[13] On November 15, 1977, the *Schema canonum Libri V de Iure patrimoniali Ecclesiae* was released for comments. It consists of fifty-seven canons grouped into five titles: 1. General Canons, 2. *De subiecto dominii;* 3. *De administratione bonorum;* 4. *De acquisitione, de alienatione et speciatim de contractibus;* 5. *De piis voluntatibus in genere et de piis fundationibus.*[14]

The comments made and the arguments presented at the debates of the *Coetus studiorum* were echoed in the general *Schema* of 1980, that retains *Liber* V, although it changes the heading to *"De bonis Ecclesiae temporalibus,"* with five preliminary canons, untitled, and four titles with new headings that passed unchanged into the 1982 *Schema* and into the *CIC*. Here *Liber* V is definitively structured under the heading *"De bonis Ecclesiae temporalibus,"* with five preliminary canons, untitled, and the following four titles: 1. *De adquisitione bonorum;* 2. *De administratione bonorum*; 3. *De contractibus ac praesertim de alienatione*; 4. *De piis voluntatibus in genere et de piis fundationibus*, with a total of fifty-seven canons.

V. Except for the fundamental changes that will be seen later, the content of the new *Liber* V does not differ from the content of the sixth part of *Liber* III of *CIC*/1917, which was taken as the base document for the preparatory work and upon which the appropriate corrections, deletions, and additions had to be made following the decrees and other acts of Vatican Council II, and the *Principles quae Codicis Iuris Canonici recognitionem dirigant.*[15] The most important parts of the reform are the

10. Cf. *AAS* 82 (1990), pp. 1033–1363.
11. *Comm.* 1 (1969), p. 44. Cf. A. DE LA HERA, "Los primeros pasos de la ordenación sistemática del nuevo Código de Derecho Canónico," in *Estudios de Derecho canónico y de Derecho eclesiástico en homenaje al Profesor Maldonado* (Madrid 1983), pp. 223ff.
12. *Comm.* 9 (1977), p. 229.
13. *Comm.* 5 (1973), pp. 94ff.
14. *Comm.* 9 (1977), pp. 227 and 269ff.
15. *Comm.* 5 (1973), p. 94.

gradual suppression of the system of benefices, the creation of a parish-wide community patrimony, interdiocesan communication of goods, diversification of juridical governances of goods belonging to public and private juridical persons, the stable patrimony of public juridical persons, a new governance of foundations, decentralization of norms and of patrimonial management, and more remissions to civil law.

The general orientation followed in drawing up *Liber* V recasts the old and the new on the Catholic Church's patrimonial governance as follows:

1. Patrimonial unity, reflecting the communion of goods in the Church, is confirmed by the unity of the Church's purposes, by the one Church that is served by temporal goods in performing its mission of salvation, by the Roman Pontiff's supreme jurisdiction over the Church's goods, by the solicitude of all churches, and by the availability of the goods belonging to all juridical persons for the Church's needs.[16]

2. Ecclesial and organic communion are manifested in the communication of goods (*LG* 13) that breaches the immobility of ecclesiastical patrimony, encourages the equable distribution of goods, and configures the transfer of goods among canonical juridical persons as mere acts of distribution.[17]

By virtue of this communion, income is expected from the faithful's liberality, and use of the power to tax is markedly reduced; the system of benefices is abandoned and diocesan community goods funds of equable distribution are established; unitary administrative budgets that include several dioceses are provided for; bishops are exhorted to contribute to the needs of the Apostolic See; and charitable works constitute the purpose of ecclesiastic goods, preferably for the most needy.

3. The public character of ecclesiastical patrimony is emphasized, including the patrimony of public juridical persons, upon whom the *CIC* imposes a governance closer to ecclesiastical authority than does *CIC*/1917, and the patrimony of private juridical persons that was previously marginalized from canonical discipline and now has a degree of dependence and oversight from canonical authority.

Obligatory service to the Church's objectives, the vigilance of the ordinary, and the Roman Pontiff's supreme authority bring together in the Church's patrimony the dominical power of the immediate titular and the

16. Cf. T. T. GARCÍA BARBERENA, *Patrimonio eclesiástico*, cit., p. 66; F. COCCOPALMERIO, "Diritto patrimoniale della Chiesa," in *Il Diritto nel mistero della Chiesa*, IV (Rome 1980), pp. 16ff; L. MISTÒ, "I beni temporali della Chiesa," in *Il Diritto nel mistero della Chiesa*, III, 2nd ed. (Rome 1992), p. 360; M. LÓPEZ ALARCÓN, "Apuntes para una teoría general del patrimonio eclesiástico," in *Ius Canonicum* 6 (1966), pp. 128ff.

17. Cf. E. CORECCO, *Théologie et Droit canonique* (Freiborg 1990), p. 236; V. DE PAOLIS, "I beni temporali nel Codice di Diritto canonico," in *I beni temporali della Chiesa in Italia* (Vatican City 1985), pp. 22ff.

jurisdictional, medial, and supreme powers of the ordinary and of the Supreme Pontiff. In that way the juridical person does not hold power over things for itself and for its benefit, but administers them vigilantly in the service of ecclesial objectives.

4. The figure of a stable patrimony that every public juridical person should have and that is of limited availability is created. With the consolidation of this patrimony it is claimed that public persons will not be deprived of their patrimony and cease to subsist through lack of financial resources. The excess over stable patrimony must be considered to be circulating patrimony and must be placed or invested or spent, and must not be retained or accumulated unproductively in achieving the purposes set by law and that the person agrees to achieve.

For the rest, *CIC*/1917 is retained in general terms, with a few technical improvements. For example, the special governance of obligations and contracts has been simplified and reduced to sales and leases (cc. 1297–1298). The norms on pious dispositions and pious foundations (cc. 1299–1310) have been restated. The norms on administration of goods belonging to public juridical persons have all been refined with reference to administrative competence, more intervention by financial affairs committees, more intervention by budgetary and accounting experts, the rendering of accounts, and more remission to civil law to obtain patrimonial guarantees and safety. These measures modernize the administration of ecclesiastical goods and introduce greater authenticity, transparency, and control; but, since public juridical persons always act in the name of the Church, those who administer ecclesiastical goods must take care not to engage in risky undertakings or actions the patrimonial management of which may harm the Church's image. Private juridical persons have greater liberty of action in finance and business when serving ecclesial objectives, for they act in their own name, under their own laws, and are not subject to strict canonical controls.

VI. This review of *Liber* V of the *CIC* has shown it to us as a norm and as a melting pot of other prescriptions from various sources, bringing together a confluence of canon law, with its broad openings for private and statutory law, and civil law, with generic and imprecise canonization that suggests a broad interpretation of canonized civil norms so as to avoid lacunae that might perturb the good financial governance of the Church. I therefore consider it to be of particular interest to indicate precisely which technical devices and juridical instruments can be used to interpret this amalgam of norms. It is an arduous task, for heterogeneous sources must be harmonized by evaluating the texts, their antecedents, their constituent principles, and the inspirers of the new canonical patrimonial law.[18] On the other hand, this labor must be performed on a part of canon law that is the object of an unfounded antijuridical prejudice that

18. Cf. J.J. MYERS, "Introduction," in *The Code of Canon Law* (New York 1985), p. 860.

rejects property law as being a hindrance to the communication of spiritual goods or considers Church organization contrary to the spirit of poverty. It is said that Church organization should be left to divine providence or it is deemed that the law of each nation is sufficient to take care of regulating ecclesiastical patrimony. Such attitudes bring about disinterest and even rejection and failure to apply canon law, all of which could "compromise the meaning and purpose of the ecclesiastical goods themselves."[19]

This is not the time to introduce the various arguments that justify the Church's need for financial resources to enable it to perform its ministries and worship services, spread the evangelical message, and perform charitable works especially among the poor. This is a subject that has been repeatedly treated in the study of canon law. More than convincing reasons have been amassed that few today dare to contradict since in both the Church and State, the right of association is a fundamental right and is protected by the authorities of both types of law.[20] It is a fact that achieving the Church's objectives in a modern society that is more and more compartmentalized and technical requires costly means. This is especially true for carrying the Christian message to all peoples through adequate and effective means of communication, Catholic schools, and other institutions, without neglecting the duty to multiply its charitable works, preferably among the poor.

Gathering together financial resources, managing them profitably, and applying them to proper purposes require that property law organize the attribution, buying and selling, management, and distribution of goods in an orderly and effective manner, so as to regulate justly and effectively the subsistence of juridical persons, worship, the apostolate, and other proper Church objectives. I believe that the best service that the study of canon law can render in the field of property law at this time of renewal in the Church is to devote all its efforts to helping doctrinal construction open channels for a better knowledge of this branch of canon law, stimulate interest in studying it, demonstrate the Church's need for it, and support its proper application.

The first order of business is to organize the set of norms and principles that constitute canonical patrimonial law. First, the primacy of the universal canon law must be reaffirmed, as contained principally in the *CIC* and completed and developed by private canon law and statutory law.

19. Cf. V. DE PAOLIS, *I beni temporali nel Codice di Diritto canonico*, cit., p. 11; D. FALTIN, "Diritto di proprietà ed uso dei beni temporali da parte della Chiesa," in *Problemi e prospettive di Diritto canonico* (Brescia 1977), pp. 236ff; L. MISTÒ, "I beni temporali della Chiesa," cit., pp. 364ff.

20. Cf. G. CICOGNANI, "Derecho de la Iglesia a la posesión de bienes materiales," in *El patrimonio eclesiástico. Estudios de la tercera Semana de Derecho Canónico* (Salamanca 1956), p. 7; P. FEDELE, *Lezioni di Diritto patrimoniale canonico*, cit., pp. 1–2; F.R. AZNAR GIL, *La administración de los bienes temporales de la Iglesia* (Salamanca 1984), pp. 44ff.

Secondly, the part of *CIC*/1917 that is reproduced by the *CIC* counts heavily. Canonized civil norms must also be consulted, and, lastly, the norms referred to simply as the necessary instrument for canonical patrimonial acts to be civil acts at the same time must be supplemented, interpreted, and harmonized through recourse to general principles. Some of the general principles may be theologically consistent, some extracted from the Church's social doctrine, and others may be the juridical type. Let us look at these four points, following the order in which they are given above.

1. The norms of canonical universal law constitute the basis of the Church's patrimonial juridical system. The norms in *Liber* V are sufficient as a nucleus to define and support patrimonial law, but insufficient alone to wholly satisfy juridical needs of a financial order; also needed are the expressly established canonical and civil supplements and developments. Of special interest are the consuetudinary practices in financial administration that must be condemned when they distort the canonical legal system; it must be remembered that in civil law there is no *contra legem* custom.[21]

There are norms that totally or partially reproduce texts in *CIC*/1917, and they should therefore be interpreted taking canonical tradition into account (c. 6 § 2). Other norms reproduce texts from Vatican Council II; their interpretation should therefore be based on the letter of the conciliary texts and on the principles laid down by that ecumenical assembly or deduced from their texts.

From a different point of view, there are many public law canons, such as the canons that regulate taxes and levies; the diocesan fund for supporting the clergy and the other two established by c. 1274; the hierarchical organization of financial-administrative powers and functions (Pope, bishops, immediate titulars, financial officers and financial affairs committees); norms for managing the patrimony, such as the norms that refer to budgets, accounting, rendering financial reports; and controls for the extraordinary administration of goods and the alienation of goods. Most of them are framework norms that must be developed through private law, with frequent remission to bishops' conferences or other production sources, such as the bishops of each region. "With the reduction of common legislation to nuclear legislation," writes Lamberto de Echeverría, "with the increase in autonomy for bishops' conferences and for dioceses, and with much more frequent and intense horizontal communication between the different bishops' conferences, common law needs a greater number of supplementary norms."[22] Other norms are from private law, particularly the norms that refer to patrimonial juridical acts and

21. Cf. art. 1.3 of the Spanish civil Code.
22. L. DE ECHEVERRÍA "El Derecho particular," in *La norma en el Derecho canónico*, vol. II (Pampalona 1979), p. 212.

business, and to ownership and other real rights, with many remissions to the civil law of the respective country.

The statutes are another supplementary source that should introduce important normative additions to the patrimonial governance of juridical persons, such as, for example, stating the purpose (c. 94 § 1), administering the goods (cc. 319 § 1, 325 § 1, 1257 § 2), and determining their destination after extinction of the juridical person (c. 123).

2. *CIC*/1917 has had an important presence in the preparation of the new *Liber* V. The study group charged with drawing it up took for their basic working document the sixth part of *Liber* III of *CIC*/1917, with its structure and articles. They then introduced modifications, additions, and deletions.[23] All the canons of *Liber* V except for five (cc. 1261, 1271, 1272, 1274 and 1275) have their source in *CIC*/1917.[24] Such direct precedents necessitate applying the provisions of c. 6 § 2 fairly frequently: "Insofar as they reproduce the old law, the canons of this code must also be understood to take canonical tradition into account," in other words, in addition to the rules for interpretation indicated in c. 17. As recent canonic tradition, *CIC*/1917 must be interpreted by following the doctrine laid down by jurisprudence and by authors; older canonic tradition is basically included in the sources of *CIC*/1917 compiled by Cardinals Gasparri and Seredi.[25] Theirs is a monumental work that emphasizes those sources and the extraordinary labor performed in drawing up *CIC*/1917, from which *Liber* V of the *CIC* also benefited. Nevertheless, it is important to remember that the meaning of the entire *CIC* has to go back to the mind and the principles of Vatican Council II, which were proposed by the 1967 Synod of Bishops as inspiration for the *CIC*. *Sacrae disciplinae leges* establishes the following in this regard: "If it is impossible perfectly to transpose the image of the Church described by conciliar doctrine into *canonical* language, nevertheless the Code must always be related to that image as to its primary pattern, whose outlines, given its nature, the Code must express as far as is possible."[26]

3. Civil legislation takes up a great parcel of the Church's patrimonial law. Various canons refer at length to civil law; among them, c. 1290 canonizes the obligations and contracts of civil law, and cc. 1255 and 1259 receive norms on the acquisition, administration, and alienation of goods. Other parts of *Liber* V make simple references to civil norms: for example, c. 1274 § 5 references the civilly effective constitution of the diocesan funds it mentions; c. 1284 § 2 refers to civil insurance contracts and the observance of certain civil norms in the administration of goods; c. 1286

23. *Comm.* 5 (1973), p. 94.
24. Cf. PCILT, *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus. Fontium annotatione* (Vatican City 1989), pp. 341ff.
25. Cf. P. GASPARRI-I. SEREDI, *Codicis Iuris Canonici Fontes*, 9 vols (Rome 1933–1962).
26. Cf. *Pamplona Com*, pp. 38–41.

imposes the duty to comply with the civil social and labor laws; and c. 1289 alludes to the observance of civil formalities in *mortis causa* dispositions.

Therefore, canonizing norms are distinguished from reference norms. Canonizing norms incorporate into canon law other civil norms that must be observed in the canon norm with the same effects (c. 22). Reference norms, without producing such incorporation, must be observed marginally to canon law.[27] In both types, the object is that institutions, situations, and juridical acts be accompanied with civil results so that they may all be useful in serving the Church's purpose. However, while canonized civil law is observed by incorporation into the canon law system, the referenced norm is applied in parallel with canon law so that constituted situations and juridical acts performed in conformity with Church law may be reinforced, guaranteed, or defended by civil law. In addition, canonization operates in slightly different ways, depending on the canonical or civil status of the individuals. Thus, for example, if a canonical public juridical person buys something from a physical person or a civil entity, State law is directly applied because the thing is not yet ecclesiastical. If the transfer is made to another public canonical person, the act is canonical and, if carried out by canonization in accordance with State law, will produce the same effects as a civil act. If the transfer is made to a civil individual, I think that the act is still canonical because the goods are ecclesiastical.

The presence of civil law is also demonstrated by the use in canonical norms of ideas, expressions, and techniques proper to civil law that had already entered *CIC*/1917, some from Roman-canonical common law and some from civil codes and their interpreters. But in any case, civil norms must be applied within the limits indicated by canon law, in harmony with it and keeping in mind the high theological, socio-economic, juridical, and moral principles that preside over all canonical patrimonial law and the acts of its operators.

4. And lastly, an important place must be reserved for principles in this interpretation of the heterogeneous conglomerate of norms, where each group of norms is separately subjected to various interpretation criteria depending on whether they are public or private, canonical or civil, with strictly juridical content or colored with economic, financial, accounting, or other kinds of elements. All interpretive models must be in harmony so that application of the norms leads in a unified way to the effective accomplishment of the objectives established by c. 1254 § 2 of the *CIC*. The jurist must perform this function by having recourse to the principles that inspired the codification work and that were present in the work and endure today and every time the *CIC* norms need to be applied.

27. Cf. J. MALDONADO, *Curso de Derecho canónico para juristas civiles. Parte general* (Madrid 1975), pp. 169–173; P. CIPROTTI, "Le 'leggi civili' nel nuovo Codice di Diritto canonico," in *Apollinaris* 57 (1984), pp. 287–289.

Next we shall explain the principles that most directly affect juridical law.

a) *Communio*. Internal communion is a work of the Holy Spirit, who "is, for the entire Church and for each and every believer, the principle of their union and unity in the teaching of the apostles and fellowship, in the breaking of bread and prayer (cf. Acts 2:42 Gk.)" (*LG* 13). Furthermore, "the Holy Spirit, who inhabits believers and fills and governs the entire Church, is the embodiment of the wonderful union of the faithful and so closely unites them all in Christ, which is the principle of the unity of the Church" (*UR* 2). But communion is both internal and external because it "is concretized in the visible external behavior of adhering to a credo, participation in the sacraments and observance of the law."[28] Therefore, communion among all the faithful and communion of individual churches among one another and with the universal Church include not only the internal aspect of spiritual life, but also the external aspect of material goods that are needed to accomplish the Church's proper objectives. Among the various parts of the Church "there is a bond of close communion whereby spiritual riches, apostolic workers and temporal resources are shared. For the members of the people of God are called upon to share their goods, and the words of the apostle apply also to each of the Churches, 'according to the gift that each has received, administer it to one another as good stewards of the manifold grace of God' (1 Pet. 4:10)" (*LG* 13).

The communion of goods belonging to public juridical persons is similar to the model of organic communion in the diocese. It constitutes the typical patrimonial unity of the Church in which the bishop is the promoter and coordinator of diocesan financial administration (c. 1276), where fragmentation of the various patrimonial administrations may create tensions that should be avoided and overcome in the spirit of communion.[29] Manifestations of diocesan organic communion include the duties and taxing rights of the diocesan bishop (cc. 1261 § 2, 1262 and 1266), the diocesan fund for supporting the clergy (c. 1274 § 1), the diocesan common fund for other personal attentions (c. 1274 § 3), and the ordinary as executor of all pious dispositions (c. 1301 § 1).

The interdiocesan communion of goods has two important manifestations in the *CIC*. One, help given by the richer dioceses to the poorer ones (c. 1274 § 3) and interdiocesan federations (c. 1274 § 4), is in observance of the Council's recommendation, "Furthermore, bishops should bear it in mind that in the expenditure of ecclesiastical resources they must take into account the needs not only of their own dioceses but of other individual churches, since they too form part of the one Church of

28. R. CASTILLO LARA, "La communion ecclésiale dans le nouveau Code de Droit Canonique," in *Studia Canonica* 17–2 (1983), p. 336.
29. Cf. V. DE PAOLIS, "I beni temporali nel Codice di Diritto canonico," cit., p. 27.

Christ" (*CD* 6). Another refers to the administration of goods of various dioceses (c. 1275).

The communion of individual churches with the universal Church nourishes the bishops' obligation "to have such care and solicitude for the whole Church which, though it be not exercised by any act of jurisdiction, does for all that redound in an eminent degree to the advantage of the universal Church" (*LG* 23) and is manifested in c. 1271, "By reason of their bond of unity and charity, and according to the resources of their dioceses, bishops are to contribute to the provision of those means which the Apostolic See may from time to time need to exercise properly its service to the universal Church."

The Roman Pontiff is a sign of unity and communion in the universal Church, and, by virtue of the primacy of law, "the supreme administrator and distributor of all ecclesiastical goods." The Supreme Pontiff's reach is defined by the supreme jurisdictional power that is his competence; that is, not in the nature of ownership, but with his status as supreme administrator and dispenser, he may perform all acts of ordinary and extraordinary administration over ecclesiastical goods within the competence of others.

With regard to temporal goods, ecclesial communion also implores the faithful: "To live in 'fraternal communion' (*koinonía*) means to be 'of one heart and soul' (Acts 4:32), establishing fellowship from every point of view: human, spiritual and material" (RM 26). To this spirit of communion corresponds c. 222 § 1, according to which "Christ's faithful have the obligation to provide for the needs of the Church, so that the Church has available to it those things which are necessary for divine worship, for works of the apostolate and of charity and for the worthy support of its ministers"; and the diocesan bishop should remind the faithful of this duty and urge them to fulfill it in an appropriate manner (c. 1261 § 2). In addition, the faithful can freely donate temporal goods to the Church without specifying a purpose (c. 1261 § 1) and give help through the appeals asked of them (c. 1262). Corecco is very critical of this *CIC* levy ordination with regard to the faithful because it is not based on the principle of communion, but on an image of the Church as *societas perfecta*, and leads to the conception in this area of temporal goods law of the Church-faithful relationship through the same tax parameters as those belonging to the State-citizen relationship.[30]

The spirit of communion should also guide the patrimonial actions of private juridical persons. Whether or not they enjoy juridical personality and have broad autonomy, they are arranged for common ecclesial purposes and related in some way to the universal Church's and diocese's patrimonial governances. Indeed, the spirit of communion must compensate

30. Cf. E. CORECCO, *Théologie et Droit canonique*, cit., pp. 235–236.

for the greater dissociation of private juridical persons so as to maintain the ecclesiality of Church patrimony.

b) The *principle of decentralization* is by nature juridical and therefore it is in relation to the societal dimension of the Church that it is best to place the problem of decentralization as an organizing principle applicable to the Church's hierarchical structure.[31] Decentralization concerns the organization of the Church's government. Because it answers to the principle of unity of power, the Church cannot overstep territorial limits with regard to recognition and respect for the functions of each vicarial organ.[32]

For its orderly effectiveness the principle of decentralization is complementary to the principle of subsidiarity, by virtue of which "a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good" (*CAn* 48). The principle of subsidiarity is included in the *Principles* approved by the Synod of Bishops in 1967 in these terms: "Particular attention is to be given to the principle of subsidiarity which flows from the preceding principle; this principle must be applied in the Church, especially as the office of bishops with its powers is of divine law; in virtue of this principle and provided that legislative unity and universal and general law are respected, provision for the interests of individual institutes by particular laws and a healthy autonomy of particular executive power is recognized as proper and necessary" (*CIC, Prefacio*).[33]

These principles are evident in the extensive participation given to private law (intra-ecclesial subsidiarity) and civil legislation (extra-ecclesial subsidiarity) in canonical patrimonial law.[34]

c) The *principle of purpose* has been codified in c. 1254 § 2 and in the canons that state the Church's purposes, such as cc. 114 § 2 and 298 § 2. The principle of purpose is a key factor in the configuration of the Church's patrimony and in the orientation of its financial activity. An interpreter must keep this teleological criterion very much in mind, for it ordains the functionality of ecclesial goods in the ultimate service of man and his salvation, "that worldly things and human institutions are ordered, according to the plan of God the Creator, towards the salvation of men"

31. Cf. J.M. GONZÁLEZ DEL VALLE, "Descentralización y 'communio': planteamientos doctrinales," in *Ius Canonicum* 24 (1984), p. 497.

32. Cf. J. HERVADA-P. LOMBARDÍA, *El Derecho del Pueblo de Dios. I. Introducción. Derecho constitucional*, Pamplona 1970, pp. 380–381; G. DELGADO, *Desconcentración orgánica y potestad vicaria* (Pamplona 1971), pp. 1–75; ID., "Principios jurídicos de organización," in *Ius Canonicum*, 13 (1973), pp. 107–134.

33. Cf. in *Pamplona Com*, p. 55.

34. Cf. V. DE PAOLIS, "De bonis Ecclesiae temporalibus in novo Codice Iuris Canonici," in *Periodica* 73 (1984), p. 119–121; V. ROVERA, "Il libro V: I beni temporali della Chiesa," in *Il nuovo Codice di Diritto canonico. Studi* (Leumann 1987), p. 227.

(*CD* 12). Within this principle are found others, such as the public principle, and it marks the guiding lines of the Catholic Church's financial system and is identified with conciliary and pontifical social doctrine, as we shall now see.

d) The *public principle* underlines the public law function that individuals owning ecclesiastical goods have in canon law (c. 1258), as do all goods belonging to canonical juridical persons and destined for service to the Church and mankind, excluding any profit or personal benefit. This obliges the interpreter to consider the important public component of the goods, because their destination transcends the private use of the faithful in order to serve "the edification of the Body of Christ" (*CD* 12) and all men "in the sense that they do not benefit him alone, but also others" (*GS* 69), principally the poor (*LG* 8). Nor are private juridical persons relieved of the public function, although they have more liberty to determine their own patrimonial governance within specified limits.

e) Finally, also in force here are the principles laid down by the Church's social and economic doctrine when its juridical persons must act in civil society and when developing their internal finances so that the Church's reputation will also shine in managing and administering its goods. Canonical juridical persons will have to use the means offered by each country's economic system to be able to acquire legally the resources needed to support and complement their mission. However, once the goods have entered the Church patrimony and acquired ecclesial status, a broader concept than ecclesiastical (*cf.* commentary on c. 1258), it is not necessary to develop any economic system other than the system marked by the destined objectives of the goods and by Church doctrine on the matter. Church doctrine places all economic activity in the service of man and his dignity; it defends the natural law of property ownership, including the means of production, with its social function and universal destiny, as well as economic and business freedom.[35]

VII. The objectives, public function, and social and economic principles mentioned converge in an economic system of mediation, befitting ecclesial patrimony, where goods—goods acquired and preserved as well as profit-producing goods—should not be accumulated unless they constitute stable patrimony. Instead they should be used according to their proper destination. Prevailing in this system are gratuitous juridical acts and the broad social function of property, all ordained to serving the Church's and men's needs, especially the needs of the poorest.

Public juridical persons, being required to act in the name of the Church, are obliged to operate in a strictly licit manner when acquiring, using, and trading in goods. They must refuse possession or use of goods

35. Cf. the following pontifical documents: *RN* 17; *QA* 44–52; *DR* 31; *MeM* 82–83, 108–109, 119–121; *CAn* 6, 30, 31, 34, 43, 53.

that, depending on the circumstances, may cloud the Church's clear image, whether because of their nature or their volume, and they must not conduct activities of doubtful legality, such as speculation. On the other hand, private juridical persons may seek their objectives with greater liberty within the moral limits required by honest use of the goods, including directly or indirectly conducting business and commercial operations that do not personally profit them. Private juridical persons could even designate the profits to the finances of public juridical persons and, especially, to the finances of public juridical persons in the Church's official organization.

The repugnance once felt for business activities of ecclesial or filial entities that benefit their own objectives[36] must be overcome. In so doing, the generalized model of Church self-financing, together with the Church's growing financial needs and the current economic system, which is identified with the Church's social doctrine, allows canonical juridical persons and especially private canonical juridical persons to undertake their own or filial business activities with appropriate subjective formulas. Examples of such activities are individual businesses, funds, cooperative companies or companies of other types, partnerships and even capitalized companies, provided that they exclude speculation. Modern authors are recognizing the concatenation between the economic structures of civil society and the economic structures of ecclesiastical entities;[37] they are suggesting that the Church's finances be modernized.

36. Cf. L. DE ECHEVERRÍA, "Estructura ideal del patrimonio eclesiástico," in *El patrimonio eclesiástico*..., cit., p. 87.

37. W. SCHULZ, "Il progetto per la revisione del diritto patrimoniale della Chiesa," in *Iustitia* 33 (1980), p. 125; A. MORONI, "Alcune riflessioni sul regime dei beni della Chiesa nella nuova codificazione canonica," in *Scritti in memoria di Pietro Gismondi*, 2°, II (Milan 1991), p. 62.

1254 **§ 1. Ecclesia catholica bona temporalia iure nativo, independenter a civili potestate, acquirere, retinere, administrare et alienare valet ad fines sibi proprios prosequendos.**

§ 2. Fines vero proprii praecipue sunt: cultus divinus ordinandus, honesta cleri aliorumque ministrorum sustentatio procuranda, opera sacri apostolatus et caritatis, praesertim erga egenos, exercenda.

§ 1. The Catholic Church has the inherent right, independently of any secular power, to acquire, retain, administer and alienate temporal goods, in pursuit of its proper objectives.

§ 2. These proper objectives are principally the regulation of divine worship, the provision of fitting support for the clergy and other ministers, and the carrying out of works of the sacred apostolate and of charity, especially for the needy.

SOURCES: § 1: c. 1495 § 1; BENEDICTUS PP. XV, Let., 12 mar. 1919 (*AAS* 11 [1919] 123); *LG* 8; *CD* 28; *DH* 13, 14; *GS* 76
§ 2: c. 1496; *AA* 8; *PO* 17; *GS* 42; *DPMB* 117, 124–130, 133–137

CROSS REFERENCES: cc. 114 § 2, 298 § 1, 301 §§ 1–2, 1255, 1303 §§ 1–2

INTRODUCTION

Mariano López Alarcón

1. This canon is composed of two paragraphs whose content is so disparate that it would have been justifiable to treat the respective subject matter in two separate canons. In § 1 there is a statement that had already appeared in c. 1495 § 1, *CIC*/1917, and that it was advisable to maintain for two reasons. The first is to reaffirm *ad intra*, and in view of past errors, the Church's need to own temporal goods and the right to have them based on positive divine law and on natural law as a society that must accomplish its proper objectives.[1] The second is so that suppression of the text would not give rise *ad extra* to the interpretation that by its silence the Church was admitting the exclusive sovereignty of the State over all

1. Cf. G. VROMANT, *De bonis Ecclesiae temporalibus* (Bruges-Paris 1953), pp. 1ff; F.R. AZNAR GIL, *La administración de los bienes temporales de la Iglesia* (Salamanca 1984), pp. 44ff.

the goods situated in its territory. The text was actually at the point of being reduced to the single statement of the Church's innate right over temporal goods; and so, in the first *Schema*, it was proposed to reproduce the content of c. 1495 § 1 of *CIC*/1917, but to omit the controversial clause "libere et independenter a civili potestate."[2] In later discussions of the *Coetus studiorum*, some consultants lamented the suppression of that paragraph and it was agreed to reinsert the complete text so there would be no occasion to interpret such an omission as the Church's subjection to secular law in matters of administrative organization, a thing never considered by the *Coetus* of consultants.[3]

2. The formulation of the text, with its *ius publicum* attitude, is still anachronistic, but it is obviously applicable today for several reasons. The first is that the *CIC* is addressed to those baptized in the Catholic Church. They have a clear awareness that original law is a necessary instrument for achieving ecclesial ends; today its foundation is strengthened by the right to religious freedom, as proclaimed by Vatican Council II (*AA* 4). It would not have been consistent with that doctrine if there were no mention that the Church's right to temporal goods was *free* with respect to the State.

The second reason relates to the contention by some authors, erroneously based on council texts (*LG* 13; *GS* 40–42, 63, 71–72, 76, 88; *DH* 13), that the relative autonomy of temporal things attracts the jurisdiction of secular power over them,[4] and that remission to secular law removes the distance between the two types of law.[5]

The third is because there is no dearth of Schulte followers who continue to maintain the doctrine that the Church in the acquisition and ownership of temporal goods is subject to general secular laws.[6] It was, then, fitting to indicate the Church's liberty and independence in order to correctly interpret, in juridical-patrimonial law, the sense of the autonomy of temporal realities and canonization techniques. Canonization techniques situate applicable civil norms within the Church's internal law in spite of their secular content. The autonomy of temporal goods suggests a connection with the State through cooperative relationships between the Church and State in accordance with Vatican Council II doctrine (*GS* 76) and formalized by secular experience in concordats, agreements, and other international-level documents.

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2. Cf. *Comm.* 5 (1973), p. 94.
3. Cf. *Comm.* 12 (1980), p. 396.
4. Cf. J.J. MYERS, "Introduction," in *The Code of Canon Law* (New York 1985), p. 861.
5. Cf. W. SCHULZ, "Grundfragen kirchlichen Vermögenrechts," in *Handbuch des katholischen Kirchenrechts* (Regensburg 1983), p. 861; K. WALF, *Derecho eclesiástico* (Barcelona 1988), p. 195.
6. Cf. X. WERNZ-P. VIDAL, *Ius Canonicum*, IV, *De rebus* (Rome 1935), p. 193.

3. The subject of this innate right is the Catholic Church, which exercises its right by itself and through the Holy See and other canonical juridical persons, as established in c. 1255. The juridical content of the law is the temporal goods themselves that have a legitimate canonical holder, and the juridical acts and business established by the law, among which c. 1255 names acquisition, retention, administration, and alienation.

4. The limitations of this right are established with regard to both the objectives and the manner. The limitation of objectives is indicated in 1254 § 1, which specifies the Church's patrimonial rights "ad fines sibi proprios prosequendos"; previously Vatican Council II had emphasized this limitation when it stated that "Ecclesia rebus temporalibus utitur quantum propria eius missio id postulat" (*GS* 76). The *quoad fines* limitation excludes from the canonical system any goods that by nature are not suitable to be used for the Church's proper objectives, such as *extra commercium* goods and goods for illicit use. The conciliar text seems to imply that the *quantum* introduces a factor that reduces the amount of goods the juridical person may acquire to an amount that would be required to satisfy statutory objectives. However, I believe that the reducing factor must be exceeded, considering that the ecclesial communion and the hierarchy, the Church's patrimonial unity and the universal destination of the goods, all encourage transferring surpluses to other needy juridical persons or ecclesiastical common funds, in order to accomplish as completely as possible the Church's apostolic mission and its works of mercy, especially among the poorest. Practically speaking, in this context of community it is certain that the Church's patrimonial needs could never be fully satisfied.

The limitations regarding the manner in which the goods are administered (c. 1281 § 2) work to avoid the possibility of abuse by improper or inadequate use of the material means used, of the juridical instruments used, or the formalities followed to perform administrative acts.[7]

There is a question concerning the canonical situation of the goods that exceed the objective needs of the juridical person, and that remain accumulated and inactive. I believe they should not be denied their status as ecclesial goods; according to c. 1279 § 1, it is the ordinary whose duty it is to ensure that the goods are applied to accomplishing the designated objectives or the objectives of the diocese itself or of other juridical persons, or that the goods are used in charitable works. Mortmain situations must not be perpetuated, for, as Faltin warns, "such would be an obstacle to achieving the ends of the Church, not only as wealth impeding its witness to poverty, but also as an excessive concentration of goods which, despite having been earmarked for works of charity and administered

7. Cf. M. LÓPEZ ALARCÓN, "La administración de los bienes eclesiásticos," in *Ius Canonicum* 24 (1984), p. 108

with a spirit of detachment, would thwart greater economic development stemming from a more lively interchange of productive goods."[8]

If the goods were to be allocated to or used for objectives other than the Church's proper objectives, they would lose their status as ecclesial goods, but the capital gains, income or other profit they may have earned will have ecclesial status and will remain subject to their specific objectives. The orderly management of the goods will bring these changes about naturally, but it must always be kept in mind that goods subrogated to others of this class will be ecclesial. Businesses and other productive goods are not *per se* illicit and unqualified to be ecclesial goods; but the profit and income derived from them must be designated to fulfill the Church's proper objectives. With regard to manner, it would be illicit if possession of the goods were designated solely for the production of material goods that were not destined to serve spreading the Gospel, divine worship, government of the community of faithful, and the needs of fellow man.[9]

5. What has been written above suggests the importance of objectives as a reason for and a limitation on the Church's holding and using temporal goods, for the objectives are the principal inspiration for the configuration of canonical patrimonial law and determine the financial system, as we shall see next.

CIC/1917 referred to achieving the Church's proper objectives (c. 1495 § 1), and c. 1496 made specific mention of divine worship and the fitting support of clergy and other ministers. Vatican Council II went farther and enumerated four objectives: regulation of divine worship, fitting support of the clergy, the sacred apostolate, and charitable works, principally among the needy (*PO* 17). Those objectives were similarly listed in c. 1254 § 2, and some of them coincide with objectives listed in other parts of the *CIC* as the Church's proper objectives, for example "works of piety, of the apostolate or of charity, whether spiritual or temporal" (c. 114 § 2) and "to foster a more perfect life, or to promote public worship or Christian teaching. They may also devote themselves to other works of the apostolate, such as initiatives for evangelisation, works of piety or charity, and those which animate the temporal order with the Christian spirit" (c. 298 § 1). Other texts from Vatican Council II have indicated as the Church's objectives founding and directing schools (*GE* 8), using and owning social media (*IM* 3), promoting missionary activity (*AG* 19), helping the poor, and promoting peace and justice (*GS* 44; *AA* 8; *AG* 12). All of these are the Church's objectives that it fulfills or should fulfill so as to demonstrate its community and institutional identity. The Church's goods and financial activities are also organized for those purposes. Therefore

8. D. FALTIN, "Diritto di proprietà ed uso dei beni temporali da parte della Chiesa," in *Problemi e prospettive di Diritto canonico* (Brescia 1977), p. 238.

9. Cf. ibid.

the list in c. 1254 § 2, although indicating prevailing objectives, does not exclude other ecclesial objectives by juridical persons.

Most of the objectives are exclusive to the Church, for only the Church can actuate them, such as worship or *magisterium*; but there are other objectives that may be achieved concurrently by the Church and the State, such as education, welfare, etc. Such concurrence does not suppress the ecclesial purpose of the Church's goods when work and activities of that nature are performed, for they also bear within them the ultimate objective of the apostolate or of charity.[10]

Canon 1254 § 2 mentions the four well-known objectives of supporting the clergy, divine worship, the sacred apostolate, and charitable works, which are sufficiently broad to include other manifestations of the Church's life, such as missionary work, pious works, religious teaching, etc. Such was the opinion of the *Coetus*, which did not accept any amplification of the listed objectives, explaining that "all the other ends that could be added are nothing but the development of the ends already contained under the more general fomula of 'works of sacred apostolate and of charity.'"[11]

The four objectives listed in c. 1254 § 2 are described in other places in the *CIC*. For example, through divine worship the sanctifying function of the Church acts in conjunction with the sacred liturgy, where worship and sacraments are united as different aspects of the same reality (c. 834).[12] According to c. 281, support of the clergy and other ministers includes remuneration befitting their condition, taking into account both the nature of the office exercised and the circumstances of place and time, together with social welfare in case of sickness, disability, or old age. Married deacons who dedicate themselves full-time to the ecclesiastical ministry deserve remuneration sufficient to provide for themselves and their families, unless they already receive secular remuneration. Through the sacred apostolate all the faithful have the duty and the right to strive so that the divine message of salvation may reach more and more people of all times and all places on earth (c. 211); apostolate means "all the activity of Christ's Mystical Body" that tends to "expand the kingdom of Christ over the entire world" (*AA* 2; cf. CCE 863–865). Charity is the theological virtue by which we love God above all things for Himself, and we love our neighbor as we love ourselves for the love of God. Charity is manifested in human solidarity, also expressed by the word friendship or social work, which is a requirement of human or Christian fraternity. The

10. Cf. M. LÓPEZ ALARCÓN, "Las entidades religiosas," in *Derecho Eclesiástico del Estado español* (Pamplona 1983), pp. 351–352.
11. *Comm.* 12 (1980), pp. 396–397.
12. Cf. J. MANZANARES, "Principios informadores del nuevo Derecho sacramental," in *Temas fundamentales en el nuevo Código. XVIII Semana española de Derecho canónico* (Salamanca 1984), p. 237.

virtue of solidarity goes beyond material goods. By spreading the spiritual goods of faith, the Church has at the same time favored the development of temporal goods, frequently opening new ways (cf. CCE 1822, 1939–1942).

With regard to the preferred order of carrying out one purpose or another, the priority of aid to the poor,[13] supporting the clergy, and divine worship has been defended.[14] Elsewhere we have defended the contention that the order of objectives given in c. 1254 § 2 is not prelative in the case of patrimony inconsistent with satisfying everyone, provided that the patrimony of any one in particular has not been affected; rather, the most urgent needs should be considered.[15]

13. Cf. J. BOZAL JIMÉNEZ, *Función teológico-social de los bienes eclesiásticos en los primeros siglos de la Iglesia*, Madrid s.a., p. 16; J.M. PIÑERO CARRIÓN, *La sustentación del clero* (Seville 1963), p. 19.

14. Cf. V. REINA, *El sistema beneficial* (Pamplona 1965), p. 65.

15. Cf. M. LÓPEZ ALARCÓN, commentary on c. 1254, in *Pamplona Com*; R. NAVARRO-VALLS, "La licencia en la enajenación canónica y el Derecho español," in *Ius Canonicum* 10 (1970), pp. 322–323; F.R. AZNAR GIL, *La administración de los bienes*..., cit., pp. 42–43.

1255 **Ecclesia universa atque Apostolica Sedes, Ecclesiae particulares necnon alia quaevis persona iuridica, sive publica sive privata, subiecta sunt capacia bona temporalia acquirendi, retinendi, administrandi et alienandi ad normam iuris.**

The universal Church, as well as the Apostolic See, particular churches, and all other public and private juridical persons are capable of acquiring, retaining, administering and alienating temporal goods, in accordance with the law.

SOURCES: c. 1495 § 2; CONCORDATO fra la Santa Sede e l'Italia, 11 feb. 1929, art. 30 (*AAS* 21 [1929] 289); CodCom Resp., 23 iun. 1953; *PC* 13; *DPMB* 123, 127, 133, 134

CROSS REFERENCES: cc. 116, 118, 238, 313, 322, 361, 368, 449, 515, 634, 803, 1480

INTRODUCTION

Mariano López Alarcón

1. The preceding canon, c. 1254 § 1, which proclaims the patrimonial autonomy of the Catholic Church, is now completed in c. 1255 with the individualized attribution of patrimonial rights to certain subjects. They are the only subjects recognized as having the capacity to assume those rights and exercise them by the attribution of juridical capacity and the capacity to perform the juridical acts and business to which the preceding canon refers. These subjects are the universal Church, the Apostolic See, particular churches, and any other juridical persons. The idea of these subjects can be seen in cc. 204 § 2, 361, 368, 116 and 118. Other canons refer particularly to the status of juridical persons held by certain institutes, such as seminaries, (c. 238 § 1), parishes (c. 515 § 3), catholic schools (c. 803 § 1), bishops' conferences (c. 449 § 2), public associations of the faithful (c. 313), private associations of the faithful with juridical personality (c. 322), and institutes of consecrated life, their provinces and their houses (c. 634 § 1).

2. Canonical patrimonial capacity is attributed to both public and private juridical persons since capacity is an essential element of a juridical person.[1] Therefore, juridical acts and business that private juridical

1. W. SCHULZ, *Liber V: Kommentar, in Münsterischer Kommentar zum CIC* (Essen 1985ff), III, July 18, 1992, 1255/4.

persons perform and conduct among one another and, with greater reason, with canonical public persons, are also retained under canonical law. Private associations without personality are constituted in accordance with c. 299 and shall have canonical capacity in accordance with the stipulations on rights and obligations established by statute. Said statutes, revised by ecclesiastical authority, are the guiding norm for such associations, but the associations must use their capacity to operate through the fiduciary instruments indicated in c. 310.[2]

3. This canon generically refers canonical capacity to the acts and business of acquisition, retention, administration, and alienation according to the juridical norm regulating goods designated as temporal. We shall make a few comments on these points.

The text uses a juridical transactional terminology proper to private law, that includes the juridical process of a thing from the time it enters patrimony until it leaves, including holding it in its various uses and relationships with the subject. This generic enumeration is specified in detail in other places in the *CIC* with more precise references, such as donations (cc. 1261, 1262, 1264), alms (c. 1265), collections (c. 1266), offerings (c. 1267), insurance contracts (c. 1284 § 1,1°), preservation of goods (c. 1284 § 1,4°), productive placement (1284 § 1,6°), and expenditure (c. 1294 § 2). There are also references to prescription (cc. 1268–1270) and pious dispositions (cc. 1299–1302). Under the heading of Title I: "The Acquisition of Goods," other public law means are improperly included, such as levies (cc. 1260, 1263), taxes (c. 1264 1°), and sacramental offerings (c. 1264 2°), which are not ways of purchasing, or even ways of demanding payment.

The means of acquisition are received from the natural and positive law of each State by express stipulation in c. 1259, in a broad canonization of the modes of constituting the juridical relationship of real estate and other types of property.

The right of retention concerns defense against despoliation or unjust claims brought from the State, other institutions, or individuals. It also protects the right to peaceful ownership, to accumulate goods so that public persons may constitute a stable patrimony, and in general the right to preserve goods by administration, management, and investment to fulfill adequately the Church's proper objectives.

With regard to acts of alienation, the lacuna in *CIC*/1917 has been filled, for these acts were omitted from c. 1495, perhaps in the understanding that alienation would be included among acts of extraordinary administration. In the preparatory work of the *CIC* it was maintained that

2. Cf. M. LÓPEZ ALARCÓN, "La personalidad jurídica civil de las asociaciones canónicas privadas," in *Revista Española de Derecho Canónico* 44 (1987), p. 395.

alienation is not an administrative act,[3] thus justifying amplification with the new term in cc. 1254 § 1 and 1255 of the *CIC*. There are no differences between the capacity to perform acts of either type, although their effectiveness may be subject to other requirements, as in the case of the alienation of certain goods (cc. 1291–1295). However, in view of the fact that administration is a complex and uncertain idea in canonical law, it will have to be interpreted with broad criteria so that capacity may refer to the entire possible range of juridical acts and business in ordinary and extraordinary administration, including both organizing patrimony and performing concrete juridical acts and business directed at managing the preservation, transformation and production, and even business activities that allow material resources to be obtained for achieving ecclesial objectives.

These juridical acts and business must be performed "in accordance with the law." This expression is much more open than the expression used by c. 1495 § 2 of *CIC*/1917, which restricted the legal channel "ad normam sacrorum canonum." The juridical norm that legitimizes the Catholic Church's organization and financial activity will be the norm that is applicable with regard to the nature of the act and whether it is regulated by canon law, universal, private, or statuary law, by canonized or referenced secular law, in a harmonious interpretation consistent with the prin[redacted] (cf. Introduction to *Liber* V).

Finally, the objective of patrimonial law [redacted]gnates as temporal goods, a typical expression used [redacted] a sure distinction with respect to spiritual goods, which are [redacted]tside commerce under penalty of falling into the offence of simony if price is involved (c. 1380). The *CIC* does not offer an idea of what temporal goods are; it does not even distinguish them from spiritual goods or mixed goods—that is, from temporal things joined with a spiritual thing—as did *CIC*/1917. Things (*res*) were defined by *CIC*/1917 as one amongst other means of achieving the Church's purpose and a distinction was made among spiritual, temporal, and mixed goods. Doctrine justified the existence of spiritual things, apropos of which Professor Maldonado wrote, "If by the term 'good' one is to understand that which is suitable for satisfying a human need, one may likewise consider the existence of spiritual goods, which satisfy the highest needs of man so as to aid him in attaining his salvation."[4]

Today it seems improper to include the sacraments and other supernatural realities in the category of goods. As Professor Lombardía wrote, it is incredible that they can be owned by men in any way analogous to ownership as it is considered in civil law. For the late, great canonist, this and other problems are adequately solved when we realize that the objective

3. Cf. *Comm.* 12 (1980), p. 396; W. SCHULZ, *Liber V: Kommentar...*, cit., 1254/3.
4. J. MALDONADO, *Curso de Derecho canónico para juristas civiles. Parte general* (Madrid 1975), p. 130.

element of the juridical system is the performance or "activity of persons that constitutes the effective and actual fulfillment of their mission and duties."[5] Now, when we enter the area of temporal goods, note that in general not only performance, but also the things, belong between the objective realities of the contract and the juridical relationship. The same is true in the relationship of ownership or other property rights, where the ultimate objective is things. Together with things, performance in financial matters, which c. 1290 remits to secular law, is also a concern of canonical patrimonial law.

4. Therefore we should not omit a brief reference to the idea of goods and types of goods. The *CIC* does not define goods. Recourse must be had to the secular notion of things that can be acquired and are capable of producing financial profit. According to the types classified in secular law, some of which are of ancient configuration, goods are divided into sacred and profane, precious and common, material and immaterial, movable and immovable, durable and perishable, fungible and non-fungible, consumable and non-consumable, capital and industrial, productive or financial.[6]

The *CIC* goes only so far as to regulate sacred goods, which it designates as *res sacrae* (c. 1171) and, if they are real estate, *loca sacra* (cc. 1205ff), also using the specific terms churches, oratories and chapels, shrines, altars, and cemeteries (cc. 1214ff). With their placement outside of *Liber* V, it seems that the legislator may have wanted to preserve them from the regimen of temporal goods, tainted with profane elements. But the fact of destining or *deputatio ad cultum publicum* of sacred things (*res mixtae*) does not cause them to lose their condition as temporal things with inherent specialties due to their spiritual element. Therefore, they also fall under the protection of c. 1255 with regard to the Church's innate right over them and also with regard to the capacity of the juridical persons that are their titulars.

5. P. LOMBARDÍA, *Lecciones de Derecho canónico* (Madrid 1984), pp. 146–148.

6. F.R. AZNAR GIL, *La administración de los bienes temporales de la Iglesia* (Salamanca 1984), pp. 28ff; A. ARZA ARTEAGA, *Privilegios económicos de la Iglesia española* (Bilbao 1973), pp. 49ff; D. FALTIN, *De Iure patrimoniali Ecclesiae* (Rome 1973), pp. 88ff.

1256 Dominium bonorum, sub suprema auctoritate Romani Pontificis, ad eam pertinet iuridicam personam, quae eadem bona legitime acquisiverit.

Under the supreme authority of the Roman Pontiff, ownership of goods belongs to that juridical person which has lawfully acquired them.

SOURCES: c. 1499 § 2

CROSS REFERENCES: cc. 113 § 2, 115, 1259, 1273

COMMENTARY

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1. This text establishes actual ownership in patrimonial relationships within the Catholic Church. Ownership is different from juridical capacity, which is the potential capacity of the subject to be the owner. Ownership is also different from the capacity to act, which is the owner's capacity to act with regard to ownership. In this sense, Hervada maintains that ownership, together with juridical capacity and the capacity to act, is like the central nucleus of personality content. Juridical capacity is the possibility of being an owner; the capacity to act is used in the situations in which the subject is the titular; ownership is the juridical situation by virtue of which a subject is capable of changing, creating, or extinguishing the content of its own or others' juridical relationships. Ownership, according to the same author, has a dynamic quality that he describes as *the active principle of the juridical system*, because ownership shapes juridical reality through the constant change that juridical traffic—which emanates from ownership itself—imprints upon juridical reality, changing or extinguishing social or juridical situations.[1]

When this idea of ownership is privately construed, public factors in canon law exert an influence on it, and the concept of ownership and other real rights becomes complex. Under the influence of public law, the private ownership area becomes fragmented and gives way to other types of ownership invested with greater powers than under private ownership. An eloquent example of the confluence of both types of ownership is presented in c. 1256: ownership by a juridical person and by the Roman Pontiff.

1. Cf. J. HERVADA, "La relación de propiedad en el patrimonio eclesiástico," in *Ius Canonicum* 2 (1962), pp. 458ff.

2. The *CIC* has maintained the text of c. 1499 § 2 from *CIC*/1917, thus respecting a traditional formula of public ownership. The nature of this ownership and the Roman Pontiff's powers originated an ancient and unfinished polemic that swings between describing pontifical ownership as dominion (*dominium eminens*) or considering it to be supreme jurisdictional power.[2] The question is actually theoretical and in practice juridical persons do exercise their ownership powers without any intervention by the Holy See that might affect the owner's rights to exercise the prerogatives of ownership. The exception is the need for an authorization to alienate ecclesiastical goods valued at more than a determined amount (c. 1292); cases in which the Roman Pontiff has had to intervene are rare and always in matters of the dispensing or redistributing of great amounts of goods. We cannot speak of the powers of ownership being weakened by the potential authoritative powers of the Supreme Pontiff, for his powers are limited to regulating the structure and regimen of the Church's patrimony; the Holy See is concerned with defending the legitimate titularity of ecclesiastical goods in the service of the Church's objectives, as well as reaffirming the presence of the Roman Pontiff as a sign and principle of unity and patrimonial communion.[3]

Canon 1256 refers exclusively to ownership (*dominium*), but this term must be understood broadly to include other ownership rights as regulated by secular law and studied by civil law jurists. The legitimate ways to acquire ownership are also regulated by the applicable norms of civil and natural law, as provided in c. 1259.

3. Patrimonial ownership is characterized by several peculiar notes:

a) The supreme authority of the Pontifical Primate, referred to above, and the powers of vigilance and control attributed to the Holy See and the ordinary (cc. 1276, 305, 319, 325, 1301, 392 § 2), which concur with the power of ownership of the person to whom the goods belong.[4]

b) The only possible subjects of real ownership are the Catholic Church, the Holy See, and other juridical persons both public and private, with full acceptance of the ancient *Institutentheorie*, which replaced the

2. Cf. R. BIDAGOR, "Los sujetos del patrimonio eclesiástico y el *ius eminens* de la Santa Sede," in *El patrimonio eclesiástico. Estudios de la tercera Semana de Derecho Canónico* (Salamanca 1956), pp. 41ff; J. HERVADA, "La relación de propiedad...," cit., pp. 440ff; A. ARZA ARTEAGA, *Privilegios económicos de la Iglesia española* (Bilbao 1973), pp. 39ff; P. FEDELE, *Lezioni di Diritto patrimoniale canonico* (Rome 1977), pp. 5ff; M. LÓPEZ ALARCÓN, "La titularidad de los bienes eclesiásticos," in *El Derecho patrimonial canónico en España. XIX Semana española de Derecho canónico* (Salamanca 1985), pp. 18ff.

3. Cf. P. LOMBARDÍA, "La propiedad en el ordenamiento canónico," in *Ius Canonicum* 2 (1962), p. 424.

4. Cf. M. LÓPEZ ALARCÓN, "Apuntes para una teoría general del patrimonio eclesiástico," in *Ius Canonicum* 6 (1966), pp. 140ff.

earlier attribution of ownership of all the Church's goods to God, the saints, or the Pope.[5]

There is no inconsistency between c. 1256, which attributes ownership to all juridical persons under the supreme authority of the Pope, and c. 1273, which subjects only public juridical persons to the supreme power of administration and dispensation of the Pontiff. The reason is that the content of pontifical *auctoritas* has been gradually filled with the powers established in c. 1273.[6] But note the consistency between c. 1273 and c. 325§ 1 on the freedom to administer goods belonging to private juridical persons.

c) Because of the objectives' requirement, real ownership of canonical goods has a qualified social function adjusted to the doctrinal principles of the Church's *magisterium* with respect to the universal destination of the goods, as set forth in the introduction to book V. The social function of ecclesiastical property has remained alive through the centuries and is manifested in the attention paid to ecclesiastical public service and the needs of the poor.[7] This is ownership with a social origin, the fruit of a common effort by the faithful and of their offerings, motivated by deep religious sentiment in the service and promotion of the Church's objectives.

4. The social relevance of the Church's goods, because of their origin and their destination, is the reason that social function is more important in the Church's financial organization than ownership of the goods.[8] The social function must respect the essential content of ownership rights at the same time that it requires the owner to perform the appropriate activity so that the goods under its care may produce the maximum return in conserving them or exploiting them.[9] The word "exploit" here expresses various meanings: use, consume the fruits of, cultivate land, occupy buildings, invest money, produce goods, etc., all of which are acts of use, directed at extracting a return from the things. With the word "exploit," states Professor López Jacoiste, the ideas of ownership and use are

5. Cf. R. PUZA, *Katholisches Kirchenrecht* (Heidelberg 1986), p. 367; W. SCHULZ, "Grundfragen kirchlichen Vermögensrechts," in *Handbuch des katholischen Kirchenrechts* (Regensburg 1983), p. 865.

6. Cf. R. NAVARRO VALLS, "La licencia en la enajenación canónica y el Derecho español," in *Ius Canonicum* 10 (1970), p. 319.

7. Cf. J. BOZAL JIMÉNEZ, *Función teológico-social de los bienes eclesiásticos en los primeros siglos de la Iglesia*, Madrid s.a., pp. 13ff; V. DEL GIUDICE, "Beni ecclesiastici," in *Enciclopedia del Diritto*, V (Milan 1959), pp. 208ff; A. MOSTAZA, *Derecho patrimonial canónico, in Derecho canónico* (Pamplona 1975), pp. 317ff.

8. Cf. L. TROCCOLI, "L'elemento funzionale nella struttura del pattrimonio ecclesiastico," in *La Chiesa dopo il Concilio. Atti del Congresso internazionale di Diritto canonico* (Milan 1972), pp. 1268ff.

9. Cf. S. RODOTA, *El terrible derecho. Estudios sobre la propiedad privada* (Madrid 1986), pp. 214ff; V.L. MONTES, *La propiedad privada en el sistema del Derecho civil contemporáneo* (Madrid 1984), p. 202.

closely involved to the point that use tends to dominate as the legitimating principle of ownership. "In some sense," he writes, "the holding of the title is justified to the extent in which exploitation is made and to the extent in which the exploitation is a determining cause of its usefulness, which is not only individual, but which should be above all fundamentally social."[10] And with even greater reason we need to describe ownership in canon law as active ownership; the regulation of ecclesial patrimony suggests that it not remain passive, but be put to use in accordance with the norms of administering patrimonial goods. Care must be taken that exploitation of the goods be productive, secure, diligent, and of social benefit in the service of the Church's objectives. The presence and intervention, if applicable, of different entities to manage, consult, oversee, control, and supplement the proper activities of ownership and their ecclesial functionality all contribute to the use of the goods.

10. J.J. LÓPEZ JACOISTE, "La idea de explotación en el Derecho civil actual," in *Revista de Derecho Privado* 44 (1960), pp. 351ff.

1257 § 1. **Bona temporalia omnia quae ad Ecclesiam universam, Apostolicam Sedem aliasve in Ecclesia personas iuridicas publicas pertinent, sunt bona eccle-siastica et reguntur canonibus qui sequuntur, necnon propriis statutis.**

§ 2. **Bona temporalia personae iuridicae privatae reguntur propriis statutis, non autem hisce canonibus, nisi expresse aliud caveatur.**

§ 1. All temporal goods belonging to the universal Church, to the Apostolic See or to other public juridical persons in the Church, are ecclesiastical goods and are regulated by the canons which follow, as well as by their own statutes.

§ 2. Unless it is otherwise expressly provided, temporal goods belonging to a private juridical person are regulated by its own statutes, not by these canons.

SOURCES: § 1: c. 1497 § 1

CROSS REFERENCES: cc. 116, 123, 208, 326, 635, 714, 718, 1303

COMMENTARY

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1. The most important classification of the Church's goods is introduced in c. 1257, which subjects goods belonging to public and private juridical persons to different juridical regimens. Goods belonging to public juridical persons are designated as ecclesiastical goods, but no alternative term is used to designate the goods of private juridical persons. This innovation derives from the division of juridical persons into public and private (c. 116), a duality that has repercussions in patrimonial law such that public goods and patrimony are regulated by norms that are mostly different from the norms dictating the regimen of private persons.

It is noteworthy that the *CCEO* does not make this distinction and provides in its c. 1009 § 2 that "all goods which belong to juridical persons are ecclesiastical goods," which corresponds to the generic regulation of juridical persons. The *CCEO* also did not introduce a separation between public and private juridical persons (cc. 920–930 *CCEO*). However, c. 573

does make the distinction, with the particularity that private juridical persons are regulated solely by private law, except for the vigilance of ecclesiastical authority under the terms stipulated in c. 577, which neither mentions nor excludes vigilance in patrimonial matters.

2. Until now canonical legislation has been limited to attributing ownership of ecclesiastical goods to juridical persons without making patrimonial distinctions among them. Thus c. 1497 § 1 *CIC*/1917 provided that "Temporal goods, whether corporeal or incorporeal, movable or immovable, which belong either to the universal Church and the Apostolic See, or to some other moral person in the Church, are ecclesiastical goods." Professor Lombardía affirmed that the only function *exclusively* reserved to juridical persons by *CIC*/1917 was ownership in the domain of ecclesiastical goods, and this served to distinguish the goods destined for achieving the objectives of the Church's official organization from the personal goods of ecclesiastical officeholders and from the private goods of all the faithful.[1] But since *CIC*/1917 recognized juridical personality only for established associations and foundations, and mere approval was not sufficient (cc. 686, 687, 1098 and 1489 § 1), that meant that juridical persons had a public nature not only for their own specific ends but also for the absolute relevance that shaped the time of canonical establishment (the intervention of authority) in the dogmatic and normative draft of the subject matter. Thus the public and ecclesiastic qualities of the entity appeared as synonyms with regard to juridical personality and participation in the organizational structure of the Church.[2]

And so *CIC*/1917 did not cover the many associations that were neither established nor approved. Soon after, therefore, some began to express their doubts to the Sacred Congregation of the Council about the nature of certain specific associations, namely the Saint Vincent de Paul Conferences. And in a resolution dated November 13, 1920 (Resol. *Corrientensis*),[3] the Congregation stated that these are lay associations and not ecclesiastical ones, that they are constituted by agreement among pious faithful who united to perform exemplary pious works, but are not established by the ecclesiastical superior and do not have the requisites for approval. They are constituted, it added, under lay powers and laws and are merely recognized or praised by ecclesiastical authorities. Since these associations do not have standing within the Church, nor are any juridical effects recognized in them, they are neither governed nor regulated by ecclesiastical authority but by laymen designated according to the association statutes; but they are subject to the Church in matters of faith and

1. Cf. P. LOMBARDÍA, "Persona jurídica pública y privada en el ordenamiento canónico," in *Apollinaris* 63 (1990), p. 145.

2. Cf. R. BOTTA, "Persone giuridiche publiche e persone giuridiche private nel nuovo Codice di Diritto canonico," in *Il Diritto Ecclesiastico* (1985), I, p. 151.

3. Cf. *AAS* 13 (1921), pp. 135–144.

custom. It was also said that a bishop cannot direct these associations, although he has the right and obligation to oversee that they commit no abuses. And finally, it was recommended that the Saint Vincent de Paul Conferences should ensure that they obtain legal recognition and juridical personality from the secular government.

The public functionality of canonical juridical persons was ratified by this resolution and gained increased juridical security when ecclesiastical goods were strictly delimited, although at the cost of obscuring the figure of the faithful as protagonist of the constitution and activity of many ecclesiastical entities. Nevertheless, there were some authors who alluded to private juridical persons, distinguishing between them and public juridical persons mostly with criteria from ecclesiastical public law. Thus, for Maroto, the distinction was to be deduced from the relationship that legal entities have with the perfect society. Wernz and Vidal used similar terms to say that the difference is a function of the ordination of the juridical person in the Church's external regulation. Examples are the Apostolic See, the dioceses, certain offices and also juridical persons that are either the authority's public bodies for carrying out the Church's objectives (such as cathedral chapters and seminaries for training ministers of the Church) or institutes for the Church's public objective (such as a religious order, etc.). Using similar terms Michiels maintained that public juridical persons participate to a greater or lesser degree in the power of governance in the Church's own external law, what Ojetti termed the power of *imperium*.[4] They agree that the basis of the distinction was the mode of constituting the association—the public associations by authority and the private associations by agreement—and the purpose they were formed for—directly aimed at satisfying the Church's social objective or for the private good of the members.[5]

The associations' function of service for the spiritual good of the faithful was clearer in the associations that remained outside personifying techniques. For that reason, the study of canon law tried to include them and construe them as unitary and actually existing ecclesiastical collectives with an uncertain juridical regimen in view of the silence of *CIC*/1917. But they were recognized as a category of autonomous subjects under canon law because they behaved like centers imputed to have juridical relationships. Onclin criticized the fact that they were termed lay associations, the proper term being private associations, since they are neither

4. Cf. PH. MAROTO, "Institutiones Iuris Canonici ad normam novi Codicis," I (Madrid 1919), pp. 540–541; F.X. WERNZ-P. VIDAL, *Ius Canonicum, II, De personis* (Rome 1943), p. 38; G. MICHIELS, *Principles generalia de personis in Ecclesia* (Rome 1955), pp. 363–364; B. OJETTI, *Commentarium in Codicem Iuris Canonici, II, De personis* (Rome 1929), p. 123, note 5.

5. Cf. M. CONTE A CORONATA, *Institutitones Iuris Canonici*, I (Turin 1929), p. 158; A. VERMEERSCH-I. CREUSEN, *Epitome Iuris Canonici*, I (Rome 1963), p. 92.

profane nor secular, but religious. Like the majority of moderns, Onclin also defended a broader concept of the collective subject of canon law.[6]

With the canonical patrimonial regimen modeled after the subjects of public law, hence exhausting the Church's financial organization, serious difficulties arose when the time came to designate the goods of private persons and endow them with juridical status for performing acts of patrimonial transactions. Vromant stated that the goods of unofficially established associations like the Conferences of Saint Vincent de Paul belonged to the individuals in the associations and that such corporations do not have *ad possidendum* any legitimate rights other than the sum of the individual members' rights. Using a more organic criterion, it was held that such collectives have a natural juridical capacity (Mauro); or that group juridical subjectivity was sufficient, for it includes juridical capacity, without necessarily requiring that juridical personality be granted (Ferraboschi); and one author thought that the juridical presence of associations not recognized under canon law was demonstrated by their business nature in private autonomy and that the provisions in secular law, properly integrated with canonistic principles, were applicable to them (Baccari).[7]

3. Restoration of private juridical persons to a place under canon law was taking shape in the doctrine, with support in the texts of the cited Second Vatican Council that describe three types of groups depending on the various forms of their relationship with the hierarchy (*AA* 24). As Del Portillo indicates, these are implicitly recognized apostolic enterprises, explicitly recognized associations, and associations with a canonical mandate or mission.[8] These are, respectively, subjects without personality, private associations, and public associations.[9] The three types of associations *sunt in Ecclesia* according to the Second Vatican Council text,

6. Cf. G. ONCLIN, "*Principles* generalia de fidelium associationibus," in *Apollinaris* 36 (1963), pp. 77–85; M. CONDORELLI, *Destinazione di patrimoni e soggettività giuridica nel Diritto canonico* (Milan 1964); G. LO CASTRO, *Personalità morale e soggettività giuridica nel Diritto canonico* (Milan 1974), pp. 150ff; as with Prof. P. LOMBARDÍA in his writings: "Persona jurídica en sentido lato y en sentido estricto," in *Acta Conventus Internationalis Canonistarum*, Typis Vaticanis 1970, pp. 163ff; "Persona jurídica pública y privada en el ordenamiento...," cit.; "Personas jurídicas públicas y privadas," in *Estudios de Derecho Canónico y de Derecho Eclesiástico en homenaje al profesor Maldonado* (Madrid 1983), pp. 321ff.

7. Cf. G. VROMANT, *De bonis Ecclesiae temporalibus* (Bruges-Paris 1953), p. 44; T. MAURO, *La personalità giuridica degli enti ecclesiastici* (Rome 1945), pp. 87ff; M. FERRABOSCHI, *Gli enti ecclesiastici* (Padova 1956), pp. 265ff, 273; R. BACCARI, *Le associazioni cattoliche non riconosciute nel diritto italiano* (Milan 1960), p. 35.

8. Cf. A. DEL PORTILLO, "Ius associationis et associationes fidelium iuxta Concilii Vaticani II doctrinam," in *Ius Canonicum* 8 (1968), p. 19.

9. Cf. L. MANEZ SISTACH, *El derecho de asociación en la Iglesia* (Barcelona 1973), pp. 236ff; A. DÍAZ DÍAZ, *Derecho fundamental de asociación en la Iglesia* (Pamplona 1972), pp. 188ff; L. NAVARRO, *Diritto di associazione e associazioni di fedeli* (Milan 1991), pp. 11ff.

which means that all these associations are ecclesiastical because they are within the ecclesial community. They accomplish ecclesial objectives and, depending on the association, are either bound by or watched over by ecclesiastical authority. Juridically speaking, this becomes a relationship of submission or spontaneous participation.[10] In addition to these associations, there are those that arise from exercising the natural right of association. They do not even have their statutes reviewed by ecclesiastical authorities. They are called spontaneous associations or privately inspired groups. Some authors say they are *de iure* subjects, a broader concept than the idea of juridical person,[11] while others call them private initiatives.[12] In any case, they are *de facto* entities that are not recognized by the Church, but they may subject their members to the merely consensual juridical-internal regimen of statutes, meaning without canonical review, and outside the fiduciary techniques established by c. 310.[13]

Doctrine tends to be favorable to the patrimonial regulation that takes into account these types of juridical persons sanctioned by the Second Vatican Council. The regulation of private persons is therefore configured with their own characteristics.[14] The preparatory work of the *CIC* showed this same favorable orientation toward admitting different patrimonial regulations for public and private juridical persons. This orientation was accepted from the time of the first meetings by the *Coetus studiorum "De laicis,"* and then also accepted by the *Coetus "De bonis Ecclesiae temporalibus"* after some hesitation in the first sessions.[15]

4. This difference between the goods of public and private juridical persons was maintained in c. 1257, that subjects the goods of public persons to *CIC* norms and their own statutes, while goods of private persons are governed by their statutes and not by the *CIC* unless expressly indicated otherwise. So far the distinction is correct, for it accommodates the different degree of relationship that each type of person has with canonical authority. The difference should not have been made radical by designating only goods belonging to public juridical persons as ecclesiastical, as if to imply *sensu contrario* that the goods of private persons were outside the Church and were not included in the broad concept of ecclesiastical

10. Cf. A. DEL PORTILLO, *Ius associationis et associationes fidelium...*, cit., p. 21; A. DÍAZ DÍAZ, *Derecho fundamental de asociación...*, cit., p. 189.

11. Cf. M. CONDORELLI, *Destinazioni di patrimoni e soggettività...*, cit., pp. 107 ff; G. LO CASTRO, *Personalità morale e soggettività...*, cit, pp. 101 ff; M. TEDESCHI, *Preliminari a uno studio dell'associazionismo spontaneo nella Chiesa* (Milan 1974), pp. 1 ff, 54ff.

12. Cf. V. PRIETO MARTÍNEZ, "Iniciativa privada y personalidad jurídica: las personas jurídicas privadas," in *Ius Canonicum* 26 (1985), pp. 565–566.

13. Cf. R. NAVARRO VALLS, "Las asociaciones sin personalidad en Derecho canónico," in *Das konsoziative Element in der Kirche. Akten des VI Internationalen Kongresses für Kanonisches Recht* (St. Ottilien 1989), pp. 550.

14. See above note 6.

15. Cf. F.R. AZNAR GIL, "Los bienes temporales de las asociaciones de fieles en el ordenamiento canónico," in *Asociaciones canónicas de fieles* (Salamanca 1987), pp. 162ff.

patrimony. A first reading of the commented text invites such reasoning. But reflection going beyond the strict limits of c. 1257 raises serious doubts about this first view of the problem. It leads to other results that agree more with the principles that should inspire interpretation of the norms on the Church's temporal goods, mainly the principles of communion and purpose[16] (see Introduction to book V). In the light of these doubts, hard questions arise, especially in relation to the patrimony of private persons. Next we shall compare the two most interesting questions: the designation of the goods and their juridical regulation.

a) The designation of ecclesiastical goods in c. 1257 means they are goods that belong to juridical persons who are part of an official Church organization and also to persons linked to canonical authority by reason of submission and direction, goods governed by canon law and meant to fulfill the Church's proper objectives.

Canon 1257 § 2 is limited to establishing the juridical regime of goods belonging to private persons, but it says nothing about what they are. It simply says that they are not ecclesiastical goods. Considering this silence, it is possible for them to be designated as profane or civil, or it is possible that there is doubt as to whether the goods "pertaining to these private juridical persons, provided that they and their goods are meant to attain the same objectives as public juridical persons,"[17] are also ecclesiastical, or it is possible to doubt whether they are semi-public goods in view of the norms regulating them.[18] It may be openly concluded that they are also ecclesiastical goods in a broader sense.[19]

I think that the proper and natural place for the goods of private persons is the Church and its law. The goods of private juridical persons and the persons themselves fulfill objectives proper to the Church, which subjects them to a patrimonial system and to principles that do not basically differ from the system and principles that public persons must observe. In addition, ecclesial communion attracts such persons and goods to the canonical regimen, where they are kept under the authority of the Roman Pontiff, subject to vigilance by the ordinary and to a typically canonical statutory regulation.[20]

16. Cf. ibid., p. 182.

17. A. MOSTAZA, "Derecho patrimonial," in *Derecho canónico* (Pamplona 1975), p. 427. Cf. also S. MESTER, "I beni temporali della Chiesa (Le novità apportate dal nuovo Codice)," in *Apollinaris* 57 (1984), p. 59; V. DE PAOLIS, *De bonis Ecclesiae temporalibus. Adnotationes in Codicem: Liber V* (Rome 1986), pp. 44–45.

18. Cf. A. MARTÍNEZ BLANCO, "La persona jurídica privada en el ordenamiento canónico," in *Carthaginensia* 6 (1990), p. 338.

19. Cf. F.R. AZNAR GIL, "Los bienes temporales de las asociaciones...," cit., p. 189; A.M. PUNZI NICOLÒ, "Il regime patrimoniale delle associazioni tra ecclesiasticità e non ecclesiasticità dei beni," in *Das konsoziative Element in der Kirche...*, cit., p. 590.

20. Cf. W. SCHULZ, "Liber V: Kommentar," in *Münsterischer Kommentar zum CIC* , III (Essen 1985ff), July 18, 1992, 1257/6, 7 and 8.

Therefore in a certain way such goods are ecclesiastical. What happens is that the term has been reserved by c. 1257 exclusively for the goods of public juridical persons. Another term is needed to signify that the goods of private juridical persons belong to the Church. The term *ecclesial* is coming to be used to designate the goods of private juridical persons, as an alternative to *ecclesiastical*, which is legally monopolized to designate the goods of public juridical persons. The new term was introduced by Professor Perlado, and we see it also being used by other authors such as Moreno Antón, Martín de Agar, and Presas Barrosa.[21]

The goods of private juridical persons are in fact ecclesial because they belong to juridical persons in communion with the Church, fulfilling the Church's proper objectives. What must not happen is to separate ecclesial from ecclesiastical, because the goods of public juridical persons are also ecclesial. An *ecclesial* species must be created that includes the goods of all juridical persons, and the *ecclesiastical* species must be legally reserved to the goods of public juridical persons.

Goods that belong to associations and foundations with revised statutes and established under c. 299 are also ecclesial goods. Even though the associations and foundations have not obtained a decree of juridical personality, their members are subject to statutory stipulations and must act on the outside in accordance with c. 310. The goods of *de facto* associations are not ecclesial, for their statutes have not even been reviewed since they are not recognized by the Church (c. 299 § 3).

There are actually no objective or theological differences between goods belonging to public and private juridical persons. The difference is in the respective juridical regulations to adjust them to the extent to which they have a bond to the ecclesiastical hierarchy. That is how the *CCEO* understands it, where c. 1099 § 2 stipulates, "all goods which belong to juridical persons are ecclesiastical goods," without distinguishing between those with public or private ownership. That distinction was, however, established in c. 573 of the *CCEO*: public associations, established by the competent ecclesiastical authority or approved by said authority by decree, and private associations, which are all the others even if they have been praised or recommended by ecclesiastical authority. Private associations are not recognized in the Church if their statutes have not been reviewed by the competent authority; they are governed by private law

21. Cf. P.A. PERLADO, "Sugerencias para para una visión moderna del Derecho patrimonial canónico," in *Ius Canonicum* 9 (1969), pp. 397ff; M.G. MORENO ANTÓN, "Algunas consideraciones en torno al concepto de bienes eclesiásticos en el *CIC* de 1983," in *Revista Española de Derecho Canónico*, 44 (1987), pp. 91–92; J.T. MARTÍN DE AGAR, "Bienes temporales y misión de la Iglesia," in *Manual de Derecho Canónico* (Pamplona 1988), p. 657; C. PRESAS BARROSA, "La matización de la personalidad jurídica como tipificadora del bien patrimonial desde el nuevo Código de Derecho canónico," in *Das konsoziative Element in der Kirche...*, cit., pp. 557ff.

except for being subject to the vigilance of the authority that established or approved them.

b) The juridical regimen is also established by c. 1257. The goods of public persons shall be governed by the norms of the *CIC* and norms outside the *CIC* that affect them, not only by the norms in *Liber* V, as c. 1257 § 1 states. This legal regimen is completed and developed through the statutes that every juridical person must have, that must be drawn up in accordance with the law, that is, within the limits indicated in canonical norms. The statutes bind only persons who are members of an association or persons who have the governance of a foundation (c. 94 §§ 1 and 2). The statutes may be imposed upon a public juridical person by any authority with legislative power and by virtue of said power (c. 94 § 3).

5. Goods belonging to private juridical persons with juridical personality derived from a personality decree are ecclesial. They are regulated, in accordance with c. 1257 § 2, by the *CIC* norms that expressly refer to them or do not exclude them, although it is understood that the interpretation enjoys the *favor libertatis administrationis* established by c. 325 § 1. Said private juridical persons are bound by the preliminary canons of *Liber* V in such important matters as juridical capacity and the capacity to operate, real ownership under the authority of the Roman Pontiff, and the statutory juridical regimen. They are also affected by a large number of the canons in book V and elsewhere, such as canons regulating acquisition and administration, alienation, and pious dispositions.[22] We shall stop to consider only two points: the vigilance of the authorities in administering the goods and the authority's control over their alienation.

a) Subjection to the vigilance of the competent ecclesiastical authority is established in c. 305 in a general way for all associations of the faithful. The purpose with regard to temporal goods is to avoid abuses in ecclesiastical discipline, and the authority has the obligation and the right to inspect and exercise its governing powers over the goods in accordance with the canons that follow c. 305. The same is confirmed for private persons in c. 323, and it is specified that the authority's vigilance must ensure that the goods are used for the association's objectives (cf. c. 325 § 1). Outside of that, administration is freely governed by the provisions in the statutes. The power of vigilance is exercised by the Holy See over all associations, as specified in c. 305 § 2, but the Roman Pontiff limits his power of administration and dispensation with respect to the goods of private juridical persons (c. 1273), although he keeps all other patrimonial powers over the goods. It is the local ordinary who must watch over diocesan and other associations that operate within the diocese. The great difficulty of this juridical regimen lies in the balance that must be kept between statutory liberty and vigilance by the authority. The statutes have to be

22. Cf. F.R. AZNAR GIL, "Los bienes temporales de las asociaciones...," cit., pp. 194ff.

reviewed by the authority; they must establish a careful regimen of patrimonial administration. In that regulation, the only powers to be obeyed are the unrenounceable powers of the ordinary: to be specific, his power of governance (which includes the power to correct and sanction abuses and deviations) and the duty to oversee (so that the goods are used in accordance with established objectives) that empower him in specific cases to exercise his right to inspect, to examine books and documents, account books,[23] and any other measures directed at learning about the activity and financial status of the entity. The ordinary may not impose a patrimonial regulation or the inclusion of certain stipulations as a *sine qua non* condition to review the statutes, but shall deny it if the established regulation does not cover the canonical norms or contradicts them. If nothing is stipulated in the statutes, only the canonical norms applicable to the goods of private juridical persons shall govern.

b) Following these criteria, I believe that the duty to oversee does not include the controls establish by c. 1281 for performing extraordinary administrative acts by private juridical persons. That would restrict their freedom to manage their patrimony, with the aggravation introduced by the uncertainty about what is meant by an extraordinary administrative act.[24] For the same reason, the controls and other requirements provided in the *CIC* for the alienation of goods (cc. 1292–1295) should not affect private juridical persons. The arguments used by Aznar Gil in defense of the opposing position[25] are quite reasonable, but the basic right of private associations should prevail, the right to act with the greatest possible freedom in administering their goods as provided in c. 325 § 1. This freedom would be compromised if oversight, which is the source of the relationship with ecclesiastical authority, were carried to an extreme that exceeded a moderate and discrete intervention by the ecclesiastical hierarchy in the patrimonial regimen of these associations. Control by means of the appropriate licenses, and fulfilling the other requisites established for alienation, are directive acts, applicable only to the goods of public juridical persons (c. 319). Directive acts exceed acts of oversight and would disturb the flexible and effective administration of goods belonging to private juridical persons.

23. Cf. a. 30 from the *Instrución sobre asociaciones canónicas de ámbito nacional*, an excellent text by the XLIV Plenary Assembly of the CBS on April 24, 1986, in *BOCEE* 10 (1986), pp. 79–84.

24. Cf. M. LÓPEZ ALARCÓN, *La administración de los bienes eclesiásticos...*, cit., pp. 103–109.

25. Cf. F.R. AZNAR GIL, "Los bienes temporales de las asociaciones...," cit., pp. 194–203.

1258 **In canonibus qui sequuntur nomine Ecclesiae significatur non solum Ecclesia universa aut Sedes Apostolica, sed etiam quaelibet persona iuridica publica in Ecclesia, nisi ex contextu sermonis vel ex natura rei aliud appareat.**

In the canons which follow, the term Church signifies not only the universal Church or the Apostolic See, but also any public juridical person in the Church, unless the contrary is clear from the context or from the nature of the matter.

SOURCES: c. 1498

CROSS REFERENCES: cc. 1259, 1261–1262, 1268, 1284 § 2,3°–9°, 1287, 1289, 1292 § 2, 1293 § 2, 1296, 1299 § 2

COMMENTARY

Mariano López Alarcón

For reasons of semantic simplification this canon is the same as c. 1498 of *CIC*/1917 and explains the meaning attributed to the term "Church" when it is used in canon 1259 and those following, unless the context or the nature of the matter suggests otherwise. For example, the word "Church" is used in c. 1260 to designate the subjects who have the power of taxation, a power not invested in all public juridical persons. But c. 1259 uses the word in its legal sense, for all canonical juridical persons may lawfully acquire temporal goods.

TITULUS I
De acquisitione bonorum

TITLE I
The Acquisition of Goods

INTRODUCTION

Daniel Tirapu

1. Title I of book V of the Code considers the acquisition of goods in the Church (cc. 1259–1272). As in other places, the Code here is trying to be an adequate juridical translation of the ecclesiology contained in the documents of the Secnd Vatican Council; therefore, this title contains juridical norms that embody the Council's principles with regard to the Church's temporal goods.

Another aspect that was present in the minds of the group working on the Church's temporal goods was the development of the principles approved by the General Assembly of the Synod of Bishops in October 1967. Those principles were to be a model to follow for the entire process of revising the Code. Of special interest for the subject matter at hand was the development of the fifth directive principle to apply the principle of subsidiarity in the matter of the Church's temporal goods. A significant text brought this out at the time: "Alienum autem videtur a mente et spiritu Concilii Vaticani II, salvis disciplinis Ecclesiarum Orientalium propriis, ut in Ecclesia occidentali Statuta peculiaria adsint, quae veluti formam praebeant specificam legibus ecclesiarum nationalium. Attamen id significare non debet in legislationibus particularibus maiorem amplitudinem et autonomiam non desiderari, praesertim in iure a Conciliis nationalibus, regionalibus condendo, adeo ut aspectus peculiares ecclesiarum singularium non apparere non possint. Momentum harum peculiarium legislationum in novo Codice Iuris Canonici accuratius esset describendum praesertim in re administrativa temporali, cum regimen bonorum temporalium iuxta leges propriae nationis magna ex parte ordinari debeat."[1]

1. *Comm.* 1 (1969), p. 81; cf. V. DE PAOLIS, "De bonis Ecclesiae temporalibus in novo Codice Iuris Canonici," in *Periodica* 73 (1984), pp. 114ff.

2. With respect to the influence of the principles of the Second Vatican Council on title I of book V, we may point out the following:

a) Many times the Second Vatican Council mentioned temporal goods in general and the Church's temporal goods in particular. Among the most important texts we may cite the following: *Lumen gentium* 13 and 23; *Gaudium et spes* 42, 69, 71 and 76; *Presbyterorum Ordinis* 7, 20 and 21; *Perfectae caritatis* 13; *Christus Dominus* 6 and 28; *Dignitatis humanae* 4 and 13; *Gravissimum educationis* 8. This is not the time to make a detailed analysis of these texts, but we can offer a synthesis of the points most relevant to the purpose of our study.

b) The Church's mission "is not in the political, social, or economic order" but is rather "a religious one" (*GS* 42), but insofar as it is in the world and acts in the world, "the Church utilizes temporal realities as often as its mission requires it … The means, the only means, it may use are those which are in accord with the Gospel and the welfare of all men according to the diversity of times and circumstances" (*GS* 76).

Consequently it is a proper part of the right to religious freedom for religious communities to have the right to acquire and use the goods that fittingly accomplish its own objectives (*DH* 4).

c) Ecclesiastical goods should be administered according to ecclesiastical laws and "are to be applied always to those purposes for the achievement of which the Church is allowed to own temporal goods. These are the organization of divine worship, the provision of decent support for the clergy, and the exercise of works of the apostolate and of charity, especially for the benefit of those in need" (*PO* 17).

d) There should also be a close community of goods among individual Churches and with respect to the Holy See. Bishops "therefore, should come to the aid of the missions by every means in their power, supplying both harvest workers and also spiritual and material aids, either directly and personally themselves, or by arousing the fervent cooperation of the faithful" (*LG* 23).

It is a serious obligation of bishops to exhort the faithful in their obligation, right, and duty, to help the Church in its needs (see *PO* 20).

e) With respect to the Church's financing systems, Vatican Council II unequivocally indicates "that the so-called system of benefices is to be abandoned or else reformed in such a way that the part that has to do with the benefice, that is, the right to the revenues attached to the endowment of the office, shall be regarded as secondary and the principal emphasis in law given to the ecclesiastical office itself. This should in the future be understood as any office conferred in a permanent fashion and to be exercised for a spiritual purpose" (*PO* 20).

3. With regard to applying the principle of subsidiarity, we may point out the following:

a) In addition to the "canonizatio" of civil law as indicated in c. 1290 on contracts, there is a "canonizatio" of prescription as a manner of acquisition according to cc. 197 and 1268, with the special regimen indicated in cc. 1269 and 1270.

b) The Code attributes various powers to bishops' conferences in order to give unity to certain aspects of financial management that require being handled on a supra-diocesan scale. Among the powers indicated in title I, book V, are the following: to lay down norms for collecting contributions (c. 1262); to lay down norms regarding questing for pious purposes (c. 1265 § 2); and, in accordance with the Holy See and with its approval, lay down norms for gradually suppressing the system of benefices (c. 1272).

The bishops' conference of each ecclesiastical province has the power to determine the taxes for certain acts of executive authority and the offerings on the occasion of administering the sacraments and sacramentals (c. 1264).

c) It is the diocesan bishop's duty to urge the faithful to help the Church (c. 1261 § 2), to levy taxes (c. 1263), to authorize questing or ask for an extraordinary collection (cc. 1265 § 1, 1266) and to attend opportunely to the needs of the Apostolic See (c. 1271).

4. In a comparative study, current canons 1261, 1262, 1266, 1267, 1271 and 1272 do not involve *CIC*/1917. The remaining canons have antecedents in the precepts of *CIC*/1917, although in some cases with slight variations (cf. cc. 1499 § 1, 1496, 1503, 1505, 1506, 1507, 1508, 1510, 1511 *CIC*/1917). Only once is the Code concerned with benefices (c. 1272), whereas *CIC*/1917 dedicated eighty canons to that issue.

5. Canons 1259 and 1260 enunciate two principles in the Church's acquisition of goods: the right the Church has, in view of the political community, to acquire temporal goods by all lawful means, and the Church's original and native right (*ad intra*) to require from the faithful the goods it needs to achieve its mission. It is important to note that in this matter the Church, although it does not waive its taxation sovereignty, prefers that the faithful contribute voluntarily to the Church's expenses, as is their right and a duty (c. 1261).

6. The title we are commenting on also refers in three general ways to the norms that regulate the Church's specific means to finance itself: voluntary offerings, levies, and with regard to ecclesiastical benefices, a transitional norm to gradually eliminate the system. This title also includes the regulation of prescription and its canonical uniqueness with respect to a certain type of goods. Therefore, the following would fall within the methods specifically established by canon law: collection (cc. 1262 and 1266), questing for alms (c. 1265), voluntary donations and offerings (c. 1267), taxes through acts of executive power and offerings upon the occasion of administering the sacraments and sacramentals (c. 1264), levies (c. 1263), and the unique regulation of prescription (cc. 1268–1270).

1259 Ecclesia acquirere bona temporalia potest omnibus iustis modis iuris sive naturalis sive positivi, quibus aliis licet.

The Church may acquire temporal goods in any way in which, by either natural or positive law, it is lawful for others to do this.

SOURCES: c. 1499 §1; Signatura Sententia, 12 dec. 1972

CROSS REFERENCES: cc. 121–123, 1254, 1290, 1299

COMMENTARY

Daniel Tirapu

1. The Church's right to acquire temporal goods to fulfill its mission is stated as a principle. This statement acquires its full meaning when considering that there are not just a few nations with laws that restrict this right of the Church with arbitrary limitations. The statement is therefore a decisive manifestation of the Church's freedom to accomplish its mission: "The Church also claims freedom for herself as a society of men with the right to live in civil society in accordance with the demands of the Christian faith.

"When the principle of religious freedom is not just proclaimed in words or incorporated in law but is implemented sincerely in practice, only then does the Church enjoy in law and in fact those stable conditions which give her the independence necessary for fulfilling her divine mission. Ecclesiastical authorities have been insistent in claiming this independence in society" (*DH* 13).

The principle proclaimed in this canon is already implicitly contained in c. 1254 § 1. It is an affirmation addressed to the political community or different states "so that there might be no discrimination against the Catholic Church by way of prohibitions or restrictions of its freedom and of its capacity to acquire temporal goods. All juridical persons are entitled to this freedom and of its capacity to acquire temporal goods; in addition, this applies to every social group, in accordance with the declarations of international and constitutional texts on public freedom."[1]

2. Acquisition means taking title of temporal goods. Title may consist in the right to ownership in the strict sense and also in other rights or obligations by other subjects.[2] This topic is also closely related to the

1. M. LÓPEZ ALARCÓN, *commentary on c. 1259*, in *Pamplona Com.*

2. Cf. F. COCCOPALMERIO, *Diritto patrimoniale della Chiesa, in Il diritto nel mistero della Chiesa*, 4 (Rome 1980), pp. 26ff.

recognition of the Church's and minor ecclesiastical entities' civil personality, which is the practical affirmation of patrimonial capacity, derived from its secular capacity.

It is determined that the Church may acquire temporal goods by all lawful methods under natural or positive law that are allowed to others. The expression "method" is usually understood to mean the title, cause, or ideal action by which one acquires ownership of a thing. "Methods of acquisition" is also understood to mean the juridical means that establish the relationship between a thing and a subject and that enjoy the protection of the law.[3]

3. Various classifications have been made of the methods of acquiring goods by the Church. Coccopalmerio offers the following:

— by *liberality*: donations, bequests in wills, foundations;

— by *onerous acquisition*: sale, exchange;

— by *taxation*: taxes and levies;

— by *offering*: collection, questing for alms;

— by *acquisitive prescription* or *usucapio*;

— by other means: patrimonial income, division or extinction of a juridical person, donations and payments from the State, etc.[4]

According to López Alarcón there are methods of acquisition under private and public law. Under private law there are the *original* ones of occupancy, accession, and prescription, and *derivative* methods, that may be acts *inter vivos* and *mortis causa*. Original methods may be divided into onerous and gratuitous. Special reference should be made, under public law, to income *iure imperii*, that is not properly a method of acquisition but of requesting goods for the Church's objectives.[5]

Aznar Gil[6] establishes another classification, taking into account cc. 1259 and 1260, that distinguishes the Church's three broad *methods* of acquisition with the resulting concrete *ways* of acquiring goods:

Modes of natural law. Methods of acquiring ownership that come from natural law, and these methods of acquisition may be, and in fact are, specified by civil positive law; therefore, under c. 1290, concrete regulation must be through recourse to different civil ordinances. Among these methods the following are included: *a)* occupancy, or physical possession of a thing without an owner for the purpose of making it one's own;

3. Cf. F. AZNAR, *La administración de los bienes temporales de la Iglesia. Legislación universal y particular española* (Salamanca 1984), pp. 79ff; M. LÓPEZ ALARCÓN, commentary on c. 1259, cit.

4. Cf. F. COCCOPALMERIO, *Diritto patrimoniale...*, cit., pp. 27–28.

5. Cf. M. LÓPEZ ALARCÓN, commentary on c. 1259, cit.

6. Cf. F. AZNAR, *La administración ...*, cit., pp. 80–83.

b) accession, or acquisition of ownership by adding things to what one already owns; *c*) a contract made by consent of the parties, capable of transferring the thing with the appropriate formalities, if any (canon 1290 determines that in the matter of contracts, the norms of civil law in each country must be observed if they are not contrary to natural law or canon law); and *d*) testament or disposition of goods after death (canon 1299 § 2 provides that civil formalities should be followed, if possible).

Modes of positive law in common with civil law. These are the methods of acquiring ownership of a thing, methods established in civil law and canonized by the f,: for example, occupation, law, donation, succession (testate and intestate), prescription, etc.

Modes of positive law specific to canon law. These are the Church's own methods established in its own legislation. They may be the following: *a*) offerings from the faithful (c. 1261), either spontaneous (c. 1267) or offered upon request by the competent authority: regular collections (c. 1262), special collections (c. 1266), and questing for alms (c. 1265); *b*) ordinary and extraordinary taxes (c. 1263); *c*) taxes by different acts of executive power that grant a favor and to execute rescripts from the Holy See (c. 1264); *d*) offerings on the occasion of administering the sacraments and sacramentals (c. 1264); *e*) modifications made to an ecclesiastical juridical person: amalgamation (c. 121), division (c. 122), and extinction (c. 123).

4. The Church normally formalizes its own juridical statutes with the various States by means of concordatory norms. An important part of this matter is usually the Church's patrimonial capacity, its freedom to appeal for help from the faithful, organizing collections, financial cooperation with the State, assumptions of exemption from taxation, and the recognition of tax benefits for certain ecclesiastical juridical persons.

1260 **Ecclesiae nativum ius est exigendi a christifidelibus, quae ad fines sibi proprios sint necessaria.**

The Church has the inherent right to require from Christ's faithful whatever is necessary for its proper objectives.

SOURCES: c. 1496; CONCORDATO fra Sua Santità il Papa Pio XI e lo Stato Bavarese, 29 mar. 1924, art. 10 § 5 (*AAS* 17 [1925] 50)

CROSS REFERENCES: cc. 222, 1254, 1261, 1263, 1266

COMMENTARY

Daniel Tirapu

This canon is closely related to the previous one. Canon 1259 is an affirmation *ad extra*, directed to the political community, and c. 1260 proclaims the same right *ad intra*, within the ecclesial organization, of the Church's inherent right to require from the faithful what it needs for its own purposes. This same statement was included in c. 1496 of *CIC*/1917, but here the list of purposes in the derogated text is simplified, and the allusion that this right of the Church is independent of civil powers is eliminated. As López Alarcón has commented, "The suppression is a sound one, since such independence is implicit in the concept of *ius nativum* and, on the other hand, although it is true that the Church is independent, there are particular churches that willingly accept the cooperation of the State in their exercise of the right, mainly in Germany, through the *Kirchensteuer* (ecclesiastical tax)."[1]

The canon indicates that the right to require (*ius exigendi*) is inherent—original, not derived. If the Church has the right to acquire temporal goods because they are necessary to achieve its objectives, it seems logical that the Church also have the right to levy taxes from the faithful to acquire the goods.

2. The foundation for the power to tax had been drawn up taking into account the concept of the Church as a perfect and sovereign society. The question was thoroughly debated in the *coetus* of consultants for drawing up the current Code. There was substantial agreement in admitting that the Church's right to request from its faithful the means required to achieve its purposes is based more on the fact that the faithful are members of the Church and as such have a duty to contribute to its maintenance. In this

1. M. LÓPEZ ALARCÓN, commentary on c. 1260, in *Pamplona Com.*

sense, for some, rather than speak of *ius exigendi* it would be better to speak of *ius petendi, ius colligendi* or *ius exquirendi*; for others the actual statement in the canon could have been avoided altogether, for a reminder of the obligation of Christ's faithful to contribute to the needs of the Church would have been sufficient.[2] The issue was controversial enough that in the 1980 Schema, *ius exigendi* was changed to the expression *ius exquirendi.*[3]

In any case, the final expression in c. 1260 is a true *ius exigendi,* to be manifested principally in the different types of taxes. As Aznar Gil points out, through this canon "the Church has the right to demand from the Christian faithful the means necessary to attain the proper objectives. The Church thereby reaffirms a demand that, in spite of everything, appears to be the enunciation of a general principle which requires—in order to become a complete juridical obligation—a further determination or development on the part of the particular or general law."[4]

3. Regardless, the *ius exigendi* "maintained in the definitive text of the *CIC,* is scarcely applied, since only the contribution for the seminary (c. 264) mentions it, together with the ordinary diocesan tax on public juridical persons and the extraordinary one on physical and juridical persons, both public and private (c. 1263), distinct from the system of taxes and offerings (c. 1264). In applying this faculty, it appears that the Church does not use its power to compel nor does it impose penalties, which implies that it is left to the obligation of the faithful to provide for the needs of the Church, as prescribed in cc. 222 and 1261."[5] And this, as previously indicated, is in accordance with various texts of the Council: an appeal to the generosity and responsibility of the faithful rather than the imposition of taxing powers.

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2. Cf. *Comm.* 14 (1982), p. 400.

3. M. LÓPEZ ALARCÓN, commentary on c. 1260, cit.

4. F. AZNAR, *La administración de los bienes temporales de la Iglesia. Legislación universal y particular española* (Salamanca 1984), p. 79.

5. M. LÓPEZ ALARCÓN, commentary on c. 1260, cit.

1261 **§ 1. Integrum est christifidelibus bona temporalia in favorem Ecclesiae conferre.**

§ 2. Episcopus dioecesanus fideles de obligatione, de qua in can. 222 § 1, monere tenetur et opportuno modo eam urgere.

§ 1. Christ's faithful have the right to donate temporal goods for the benefit of the Church.

§ 2. The diocesan bishop is bound to remind Christ's faithful of the obligation mentioned in can. 222 § 1, and in an appropriate manner to urge it.

SOURCES: § 1: c. 1513
§ 2: *CD* 6, 17; *PO* 20; *GS* 88; *DPMB* 117, 124–129, 133, 134

CROSS REFERENCES: c. 222

COMMENTARY

Daniel Tirapu

1. Canon 222 § 1 states that "Christ's faithful have the obligation to provide for the needs of the Church, so that the Church has available to it those things which are necessary for divine worship, for works of the apostolate and of charity and for the decent support of its ministers."

Canon 1261 § 1 states that the faithful may donate temporal goods for the benefit of the Church. This is actually, in the long run, a manifestation of religious freedom that the secular community should respect, protect, and encourage. The statement points up two purposes: that it is not legal for secular laws to prohibit or restrict the faithful from making wills benefiting the Church or the Church from receiving the benefits; and that the faithful have the duty indicated in c. 222 § 1 to help with the Church's needs.[1] Canon 1261 § 2 binds the diocesan bishop to urge the faithful in an appropriate manner to do their duty.

In actuality, cc. 1260 and 1261 may be understood as developing c. 222. In *CIC*/1917 legal provisions were contemplated that indicate the obligation of the faithful to contribute financially to the Church's needs (cc. 1496, 1513 § 1), but current ecclesiastical legislation, in accordance with the teachings of the Second Vatican Council, makes a special point of the generic obligation.

1. Cf. M. López Alarcón, commentary on c. 1261, in *Pamplona Com.*

2. What is the nature of this obligation of the faithful? The issue is not new, for it was raised some time ago with regard to the payment of tithes and offerings to the Church. The most widely held opinion is that it arises from a serious obligation based on natural law and on the determinations established by the diocesan bishop, although the faithful who do not make a financial contribution must not be denied ministerial services.

Aznar Gil points out that "recently, this problem has again arisen in the Federal Republic of Germany because of the formal—more accurately, the civil-juridical—abandonment of the Church, *Kirchenaustritt*, on the part of the faithful so as to avoid the ecclesiastical tax, *Kirchensteuer*. In this country the obligation to pay the ecclesiastical tax ceases with the following occasions: one month after one's death, the abandonment of one's domicile or of one's habitual residence, and leaving the Church, in the month following one's declared intent to leave the Church. This last circumstance, a juridical figure specific to the ecclesiastical law of Germany, consists of a declaration before a civil judge or before a court of first instance, on the part of the contributor, who is a member of a religious confession, to the effect that one is relinquishing one's membership in that religious confession. This declaration, made by means of a personal declaration or through a written statement in the form of a public document, exempts the person, in the eyes of the government, from the payment of the ecclesiastical tax.

"The German canonical doctrine has defined this course of action as an offense against the faith and against the unity of the Church (c. 2314 *CIC*/1917) qualifying it as a 'public separation from the Church as well as a break with ecclesial unity'. More specifically, the offense does not lie in the refusal to pay the ecclesiastical tax or in the leaving of the Church, but in the public declaration renouncing unity with the Church. Consequently, the bishops of the Federal Republic of Germany have indicated that the Christian who has acted in this manner can participate in the sacramental life of the Church again only if he/she is ready to renounce the declaration of leaving it and return to fulfilling his/her duties, including the ecclesiastical tax."[2]

3. Canon 1261 confirms the legislator's option by virtue of which the Church prefers the faithful to contribute voluntarily to fulfilling ecclesiastical financial needs. As Martín de Agar points out, "the Church does not renounce its original financial sovereignty over the faithful, by which it can require proportionate contributions. This faculty has been retained in the provisions of c. 1260 and facilitated in c. 1263. Simply speaking, however, the practice of appealing to the personal responsibility of each member of the Church accords more with tradition, current sensibilities, and the status of the faithful as daughters and sons of the Church—rather than

2. F. AZNAR, "*La administración de los bienes temporales de la Iglesia. Legislación universal y particular española* (Salamanca 1984), pp. 77–78.

its subjects. As a consequence, it would appear that there are two main ways to secure income for the ecclesiastical patrimony: voluntary offerings of the faithful and ordinary taxes levied on public juridical persons."[3]

Voluntary offerings by the faithful are in line with c. 1261, and the diocesan bishop is bound to remind the faithful and urge them in an appropriate manner to make their offerings. Taxes are in line with c. 1260.

3. J.T. MARTÍN DE AGAR, "Bienes temporales y misión de la Iglesia," in *Manual de Derecho Canónico*, 2nd ed. (Pamplona 1991), p. 714.

1262 Fideles subsidia Ecclesiae conferant per subventiones rogatas et iuxta normas ab Episcoporum conferentia latas.

The faithful are to give their support to the Church in response to appeals and in accordance with the norms laid down by the bishops' conference.

SOURCES: —

CROSS REFERENCES: c. 1266

COMMENTARY

Daniel Tirapu

1. There is at present an ecclesial sense that the ordinary source of income for the Church is from the offerings of the faithful. An offering is a voluntary contribution by the faithful and is not a response to a strictly juridical obligation; it consists of goods freely offered, either voluntarily or in response to a request by the appropriate authority. Contrary to taxation, in this case there is no true juridical obligation to contribute goods, although the general obligation to contribute to the Church's needs continues in force.[1]

2. Although obviously they will be studied in the commentaries to the canons that follow, it may be advantageous to offer several classifications of the types of offerings.

For Martín de Agar[2] the principal types of voluntary offerings are the following:

— collections or requested support as in c. 1262;

— questing for alms as in c. 1265;

— spontaneous offerings as in cc. 1261 and 1267; offerings made voluntarily by the faithful without a concrete, specific request;

— offerings upon the occasion of pastoral services as in c. 1264;

— taxes called for by certain acts of executive power, although in this case their nature is somewhat more controversial.

1. Cf. F. AZNAR, *La administración de los bienes temporales de la Iglesia. Legislación universal y particular española* (Salamanca 1984), pp. 86 ff.

2. Cf. J.T. MARTÍN DE AGAR, "Bienes temporales y misión de la Iglesia," in *Manual de Derecho Canónico*, 2nd ed. (Pamplona 1991), pp. 658–660.

For Aznar Gil[3] current ecclesiastical legislation distinguishes the following types of offerings:

— spontaneous (cc. 1261, 1267);

— requested (c. 1261); may be public, either regular (c. 1262), special (c. 1266), or private (c. 1265);

— for administering sacraments and sacramentals (c. 1264 § 2).

3. When in preparing the Code it was determined to reverse the order of the final versions of cc. 1262 and 1263,[4] it became clear that the Church's ordinary system of financing should be voluntary offerings, and obligatory taxes are the extraordinary means.

The offerings in this canon are typified by being a response to a request by the Church. López Alarcón points out that in offerings "the initiative will be taken by the Church in the broad sense of c. 1258; the formulation of the request will enable the faithful who are so invited to respect their obligation to support the Church financially. The request can be made to specific members of the faithful, either orally or in writing, and indeterminately to more or less important groups, whether they are gathered together for some religious ceremony or dispersed, in which case, financial assistance may be requested by the ordinary by means of public appeals through ordinary or special means of individual and social communication."[5]

4. With regard to the competent authority for establishing and collecting offerings, cc. 1261 and 1262 present certain discrepancies. Whereas c. 1261 designates the diocesan bishop as the competent authority, c. 1262 says that the bishops' conferences have normative competency over collections (*subventiones rogatas*) throughout national territory. Canon 1262 is a new canon, without precedent in the previous Code, and it is a manifestation of the necessary coordination of powers between the bishops' conference of each country and the respective diocesan bishops in patrimonial matters. In the 1977 *Schema* a broader and more favorable principle of patrimonial competency was established for the bishops' conferences than in this canon.[6] The wording of the draft was later subject to the criticism that the powers of the bishops' conferences were excessive in view of the legitimate competency of the diocesan bishops, although in any case it was pointed out that there is a need to establish a degree of coordination between the individual churches included in the same region.[7]

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3. Cf. F. AZNAR, *La administración*... cit., pp. 87 ff.
4. Cf. *Comm.* 12 (1980), p. 402; 16 (1984), pp. 28–30.
5. M. LÓPEZ ALARCÓN, commentary on c. 1262, in *Pamplona Com.*
6. Cf. *Schema 1977*, c. 5, 2.
7. Cf. *Comm.* 12 (1980), pp. 391 ff.

5. As Aznar Gil has pointed out, "c. 1262 establishes a general principle regarding *subventiones rogatas*, public and ordinary, the most salient characteristics of which are:

"a) the objective matter on which the legal text depends consists of the offerings—of whatever type—requested by the competent ecclesiastical authorities. The broad scope of this norm—ambiguous *per se*—is defined by the following canons, which regulate the different types of financial assistance. The only conclusion from this norm is that such grants or assistance should be requested by the ecclesiastical authority, with the understanding that spontaneous offerings made by a member of Christ's faithful for a specific purpose should be earmarked for that purpose (c. 1267 § 3);

"b) Christ's faithful, in consequence of the preceding, have the obligation to contribute to the needs of the Church;

"c) finally, and this is a possible source of conflict, the text of the norm does not specify exactly which authority has competence in requesting such offerings or grants. It merely limits itself to making reference to the general principles of ecclesiastical organization to define who has this faculty (the diocesan bishop, pastor, etc.) and to facilitate the intervention of a supradiocesan body, the bishops' conference, in order to establish common channels of cooperation pursuant to their norms of operation.

"Were any interpretation to exceed these limits, it would, in our opinion, no longer respect either the letter or the spirit of the norm. For the express intent of these norms is to avoid the extremes of, on the one hand, diocesan bishops acting merely of their own accord and on the other, their indiscriminate subjection to the bishops' conference. Canon 1266, in fact, grants the local ordinary freedom in establishing diocesan collections. Both entities, the bishop and the bishops' conference, can impose—except for the principle established in c. 1266—collections outside the limits of their jurisdiction."[8]

Therefore we have to conclude that the power of the bishops' conference consists on the one hand in establishing norms for any type of collection on a national scale, and on the other hand, in establishing collections undertaken on a national scale.

8. F. AZNAR, *La administración*... cit., p. 90.

1263 **Ius est Episcopo dioecesano, auditis consilio a rebus oeconomicis et consilio presbyterali, pro dioecesis necessitatibus, personis iuridicis publicis suo regimini subiectis moderatum tributum, earum redditibus proportionatum, imponendi; ceteris personis physicis et iuridicis ipsi licet tantum, in casu gravis necessitatis et sub iisdem condicionibus, extraordinariam et moderatam exactionem imponere, salvis legibus et consuetudinibus particularibus quae eidem potiora iura tribuant.**

The diocesan bishop, after consulting the finance committee and the council of priests, has the right to levy on public juridical persons subject to his authority a tax for the needs of the diocese. This tax must be moderate and proportionate to their income. He may impose an extraordinary and moderate tax on other physical and juridical persons only in a grave necessity and under the same conditions, but without prejudice to particular laws and customs which may give him greater rights.

SOURCES: cc. 1504, 1506; SCCouncil Resol., 20 aug. 1917 (*AAS* 9 [1917] 497–502); SCCouncil Resol., 13 mar. 1920 (*AAS* 12 [1920] 444–447); SCCouncil Rescr., 9 ian. 1951; SCCouncil Rescr., 3 mar. 1955; SCCouncil Ind., 23 iul. 1955; SCCouncil Rescr., 15 ian. 1960

CROSS REFERENCES: c. 264

COMMENTARY

Daniel Tirapu

1. Taxes are also present in canonical norms; they are considered to be a secondary means of financing and, in a certain sense, supplementary to voluntary offerings, but this does not mean they are not consistent with the social nature of the Church (c. 1260) as a juridical form of the general obligation of the faithful to support the Church.[1]

Taxes may be defined as pecuniary obligations imposed by the authority upon its subjects with no direct and concrete consideration for the subjects. For Aznar Gil, they are "the different contributions in the form of

1. J.T. MARTÍN DE AGAR, "Bienes temporales y misión de la Iglesia," in *Manual de Derecho Canónico*, 2nd ed. (Pamplona 1991), pp. 660–661.

goods (usually currency) from juridical or physical persons made in response to compulsory requests of the legitimate ecclesiastical authority. The extent of such contributions is not always predetermined, and may or may not involve the performance of some public service."[2] But it must be taken into account that included in the concept for this author are taxes and offerings upon the occasion of pastoral services, that are of a controversial juridical nature. The idea of tax in c. 1263 in the strict sense would be "the proper monetary contribution on the part of physical or juridical persons, predetermined and compulsory in form, levied by the diocesan bishop. It does not involve the performance of some service on the part of the ecclesial community."[3]

For Martín de Agar the actual taxes contemplated in the Code "have certain common characteristics: *a)* it is up to the diocesan bishop to determine how to impose them in the most appropriate and effective manner; *b)* they are of a general character; one cannot impose them on singular subjects; *c)* they are diocesan: their establishment, subjects, collection, and final application must all take place in the same diocese; *d)* the collection quota must always be moderate and attuned to the financial state of each passive subject. Moderation implies that the real needs of the diocese are assessed in conjunction with those proper to the subject persons, lest the diocese hinder them from attaining their ends. The Code makes specific reference to the income, which fashions the taxes as burdens upon the rent and, indirectly, hinders their status as taxes on the stable patrimony of the persons so obliged."[4]

Ecclesiastical taxes of historical importance that were specified in *CIC*/1917 have disappeared: tithes and *primitiae* (c. 1502), the *cathedraticum* (c. 1504), the pension benefice (c. 1429), the charitable subsidy (c. 1505), the tax for the welfare of the diocese or of the patron of a church (c. 1506), and the *medias annatas* (c. 1482).

2. Canon 1263 includes the following taxes:

a) *Ordinary tribute*: *a)* This is a fixed general contribution to the needs of the diocese. *b)* Imposition of this tax is the responsibility of the diocesan bishop by a *decree* that due to its special character and meaning must specify as exactly as possible the persons taxed and the amount to be paid. *c)* For the decree to be valid the ordinary must solicit the opinion of the presbyteral council and the finance council (cf. 127 § 1). *d)* The remaining legal details of the tax must be determined: frequency, installments, purposes, method of payment, exemptions, etc. *e)* The subjects to be taxed are the public juridical persons subject to the bishop's

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2. F. AZNAR, *La administración de los bienes temporales de la Iglesia. Legislación universal y particular española* (Salamanca 1984), p. 94.
3. F. AZNAR, *La administración*..., cit., p. 96.
4. J.T. MARTÍN DE AGAR, "Bienes temporales...," cit., p. 661.

jurisdiction. *f)* The amount of the tax must be proportionate to the income of each juridical person affected.[5]

b) *Specific ordinary tribute.* First, the so-called *seminary tax* may be mentioned, to provide for the needs of a seminary (c. 264). All juridical persons are subject to this tax, both public and private, if they have an establishment in the diocese, regardless of whether they are subject to the bishop's jurisdiction. The tax shall be moderate according to the seminary's actual needs that are not covered by other means. Certain subjects are exempt from this tax, such as juridical persons who live solely on alms or who have duties similar to those of a seminary.

c) *Extraordinary diocesan tribute.* This is a contribution for cases of extreme necessity that cannot be established as a fixed tax. The general conditions of an extraordinary tax are the same as for an ordinary tax, but the taxable subjects are different. An extraordinary tax includes private juridical persons and physical persons subject to the bishop's jurisdiction. It is not clear whether this tax may also be imposed upon public juridical persons; the literal meaning of the canon appears to exclude them (*ceteris*).

d) The final paragraph of this canon opens up the possibility of imposing other taxes based on private law.

3. With regard to determining the taxable subject of a diocesan ordinary tax, the *response* of the PCILT of May 20, 1989 must be taken into account, according to which external schools of religious institutes of pontifical law are not included in the designation "public juridical persons under diocesan jurisdiction."[6]

However, from a doctrinal point of view we may ask if the reason for this non-subjection is that since they are public juridical persons they are not subject to the jurisdiction of the diocesan bishop, or is it simply that they are not public juridical persons. For Martín de Agar, the reason for the negative seems to lie in the fact that those schools are not under the jurisdiction of the diocesan bishop. In the opinion of Miras, the affirmation presupposes a risk of extrapolating the response, the direct object of which is strictly to say that, under the assumption of c. 1263, those schools are not included in the expression "public juridical persons under diocesan jurisdiction." In other words, the affirmation that the schools are not subject to the jurisdiction of the diocesan bishop, without further distinction, appears to be mistaken.

What we wish to stress is that the literal meaning of the response indicates that under the assumption of c. 1263, with reference to the diocesan ordinary tax, those schools are not included in the public juridical

5. Cf. F. AZNAR, *La administración…*, cit., p. 99; J.T. MARTÍN DE AGAR, "Bienes temporales…," cit., p. 661.
6. *AAS* 81 (1989), p. 991.

persons subject to the jurisdiction of the bishop and are therefore not automatically subject to the tax. To interpret whether this is because the schools are not public juridical persons or because, if they are, they are not subject to the jurisdiction of the diocesan bishop, requires further details and considerations.[7]

7. Cf. J.T. MARTÍN DE AGAR, "Nota a la respuesta del 24 de enero de 1989 de la Comisión Pontificia para la interpretación de los textos legislativos," in *Ius Ecclesiae* 2 (1990), pp. 348–351; J. MIRAS, "Comentarios a las respuestas de la Comisión Pontificia para la interpretación de los textos legislativos," in *Ius Canonicum* 31 (1991), pp. 222–224.

1264 **Nisi aliud iure cautum sit, conventus Episcoporum provinciae est:**
1° praefinire taxas pro actibus potestatis exsecutivae gratiosae vel pro exsecutione rescriptorum Sedis Apostolicae, ad ipsa Sede Apostolica approbandas;
2° definire oblationes occasione ministrationis sacramentorum et sacramentalium.

Unless the law prescribes otherwise, it is for the provincial bishops' meeting to:
1° determine the taxes, to be approved by the Apostolic See, for acts of executive authority which grant a favour, or for the execution of rescripts from the Apostolic See;
2° determine the offerings on the occasion of the administration of the sacraments and sacramentals.

SOURCES: c. 1507 § 1; SCCouncil Resol., 11 dec. 1920 (*AAS* 13 [1921] 350–352)

CROSS REFERENCES: cc. 135 ss, 431 ss, 531, 551, 848, 945–958, 1181, 1380, 1385, 1649

COMMENTARY

Daniel Tirapu

It is for the provincial bishop's meeting of each ecclesiastical province (c. 431) to determine the administrative taxes and offerings upon the occasion of pastoral services, unless the law prescribes otherwise.

The concept of taxes and offerings upon the occasion of pastoral service appears in this canon. The juridical nature of both is somewhat controversial, since for some authors they are considered to be offerings by the faithful, and other authors are inclined to consider them to be special taxes. Canon 1264 has its antecedent in c. 1507 of *CIC*/1917.

The reason for the canon is twofold: first, to define uniform taxes within the ecclesiastical province and for the Holy See to have ultimate control in approving taxes; second, to establish a clear distinction between the concept of taxes and offerings received for administering sacraments and sacramentals. At an early point in the work of drawing up the Code, the distinction was not so obvious.[1]

1. Cf. *Comm.* 12 (1980), p. 403.

1. *Taxes*. They are financial obligations to be paid by those who request an act of administrative power (license, dispensation, procedure, certification). These taxes are divided between administrative and judicial, depending on the nature and the body that performs the act of administrative power. For Aznar Gil they are "emoluments established by ecclesiastical legislation and requested from the faithful by the competent ecclesiastical authority for the performance of an administrative act or for a judicial act—whether favors by executive authority or the execution of rescripts of the Holy See."[2] Acts of administrative power that grant favors (cc. 135ff) and the execution of rescripts of the Holy See (cc. 59ff) are the objects of the administrative tax. Payment should be made to the administrative entities that perform the requested activity: the Holy See, diocese, parish, etc. Commissary responses from the Holy See, the execution of which is commended to a lesser body, also give rise to the right to impose taxes by the executor.

Judicial taxes, however, are not regulated by this canon, since they are determined by the bishop with jurisdiction over the tribunal (c. 1649).

2. *Offerings on the occasion of a pastoral service*. These are offerings requested from the faithful upon the occasion of administering certain sacraments and sacramentals. As Martín de Agar indicates, "they are not taxes, nor do they constitute a payment for services rendered. This explains the use of the term 'on the occasion of', to the exclusion of others which could suggest a form of compensation, or even worse, simony, the buying and selling of spiritual goods. Consequently the pastoral service that occasions these offerings cannot be denied to those unable to meet them in whole or in part (cc. 848 and 1181), nor even to those who refuse to make them.

"The establishment of the scale for these offerings falls within the competence of the provincial assembly of bishops. This scale is to indicate the maximum that can be required, though the faithful can give more or less than the indicated amounts."[3]

Canon 848 prohibits asking more than what is determined by the competent authority, and there are canonical penalties for cases of abuse (cc. 1380, 1385). There are also specific rules in the case of offerings received for the celebration of Masses (cc. 945–958) and with regard to funeral offerings (c. 1181), where it is clear that any preference of persons by reason of the taxes received must be avoided, and for the same reason the poor must not be deprived of funeral rites.

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2. F. AZNAR, *La administración de los bienes temporales de la Iglesia. Legislación universal y particular española* (Salamanca 1984), pp. 100–101.

3. J.T. MARTÍN DE AGAR, "Bienes temporales y misión de la Iglesia," in *Manual de Derecho Canónico*, 2nd ed. (Pamplona 1991), pp. 714–716.

Lastly, Martín de Agar indicates that "when the pastoral services that occasion these offerings constitute the so-called parish functions of c. 531, as would normally be the case, these offerings are understood as made to the parish—unless there is an express wish to the contrary—and not to the parish priest as had been established in c. 463 § 3 of the *CIC*/1917. The provision also applies to anyone other than the parish priest who has performed some parochial function. The bishop should determine more precisely the destination of such offerings and provide for the remuneration of clerics who fulfill such a parochial function (cc. 531, 551).

"It seems, however, that when these functions are lawfully fulfilled in a church distinct from the parish, the offerings should be destined—in whole or in part—to that church, at least whenever the performance of such functions is in response to a request of the local ordinary (c. 560) or to the will of the faithful (for example, see cc. 1115 and 1177)."[4]

4. J.T. MARTÍN DE AGAR, "Bienes temporales...," cit., p. 715.

1265 **§ 1. Salvo iure religiosorum mendicantium, vetatur persona quaevis privata, sive physica sive iuridica, sine proprii Ordinarii et Ordinarii loci licentia, in scriptis data, stipem cogere pro quolibet pio aut ecclesiastico instituto vel fine.**

§ 2. Episcoporum conferentia potest normas de stipe quaeritanda statuere, quae ab omnibus servari debent, iis non exclusis, qui ex institutione mendicantes vocantur et sunt.

§ 1. Without prejudice to the right of mendicant religious, all private juridical or physical persons are forbidden to quest for any pious or ecclesiastical institute or purpose without the written permission of their proper Ordinary and of the local Ordinary.

§ 2. The bishops' conference can draw up rules regarding questing, which must be observed by all, including those who from their foundation are called and are 'mendicants'.

SOURCES: § 1: c. 1503; CodCom Resp., 16 oct. 1919, no. 10 (*AAS* 11 [1919] 478); SCEC Decr. *Saepenumero Apostolica Sedes*, 7 ian. 1930 (*AAS* 20 [1930] 108–110); SCEC Decr. *Sacrae Congregationi*, 20 iul. 1937 (*AAS* 29 [1937] 342–343)
§ 2: c. 1624; *ES* I, 27

CROSS REFERENCES: c. 116

COMMENTARY

Daniel Tirapu

Canon 1265 concerns begging for alms, also called questing. The norms to follow thereon are determined in the following manner:

a) For a private person, physical or juridical, to be able to quest for any pious or ecclesiastical purpose, a written license is required from its proper ordinary and the local ordinary. Although it is not expressly stated, the Code gives the right to public juridical persons to quest within the area of their own competence. The private juridical person is a concept that is greatly limited in the current legislation (c. 116). "The same does not occur with the concept of a private physical person: according to the traditional understanding 'private' denotes persons not endowed with an ecclesiastical office, provided that in such a situation they do not act in the name of the Church. Therefore, the parish priest is considered to be acting

as a public person when he exercises his tasks within his jurisdiction. As such, he does not need the permission of the ordinary to undertake charitable collections for the benefit of the pious works existing in his parish."[1]

b) Mendicant institutes are excluded from this norm. "Mendicants" is meant in the strict sense, "namely, those prohibited from possessing goods in common or stable incomes in virtue of their foundational statutes, as, for example, the Friars Minor and the Capuchins. Not included are mendicants in a broad sense such as the members of the Order of Preachers (Dominicans). The reason for this privilege given to mendicants is that the permission of the authority is considered granted to them once and forever, provided that questing for alms forms an integral part of their discipline."[2]

For that reason any other institute of consecrated life is prohibited from begging for alms without the written permission of its proper ordinary and the local ordinary.

With regard to mendicants, López Alarcón says that "the right of mendicants to beg for alms was regulated in detail in the *CIC*/1917 (cc. 621ff) and is retained in the *CIC*. However, it is to be regulated by particular law issued by the bishops' conferences, which shall take into consideration the prescriptions of 27 § 2 of the *motu proprio Ecclesiae Sanctae* I, according to which 'religious should not collect funds by way of public subscription without the consent of the Ordinaries of the places where such collections are being made.'"[3]

c) Canon 1265 § 2 empowers the bishops' conference to issue norms regulating questing for alms that must be followed by all: public juridical persons, private persons—physical and juridical—including persons who call themselves and who in fact are mendicants.

1. F. AZNAR, *La administración de los bienes temporales de la Iglesia. Legislación universal y particular española* (Salamanca 1984), p. 92.
2. Ibid.
3. M. LÓPEZ ALARCÓN, commentary on c. 1265, in *Pamplona Com*

1266 **In omnibus ecclesiis et oratoriis, etiam ad instituta religiosa pertinentibus, quae de facto habitualiter christifidelibus pateant, Ordinarius loci praecipere potest ut specialis stips colligatur pro determinatis inceptis paroecialibus, dioecesanis, nationalibus veluniversalibus, ad curiam dioecesanam postea sedulo mittenda.**

In all churches and oratories regularly open to Christ's faithful, including those belonging to religious institutes, the local Ordinary may order that a special collection be taken up for specified parochial, diocesan, national or universal initiatives. The collection must afterwards be carefully forwarded to the diocesan curia.

SOURCES: c. 1505; *ES* III, 8

CROSS REFERENCES: cc. 791, 1214, 1223, 1262

COMMENTARY

Daniel Tirapu

Local collections are those carried out in specified sacred places such as churches and oratories (cc. 1214ff, 1223ff). This canon refers to special collections that may be established by the local ordinary for specified diocesan or supradiocesan needs. This is a new canon, with no direct precedents in *CIC*/1917, and it gives the ordinary this power in the following terms:

a) It concerns special collections since ordinary collections are covered in c. 1262. For Aznar Gil, "the extraordinary nature of this type of collection becomes quite clear when one studies the process of its codification. Its extraordinary character was explained in the opinion of one consultor, as attributing to the bishop a broad authority in indiscriminately establishing special collections throughout the entire diocese. The response was 'one can reliably deduce from the tenor of this canon the extraordinary character of this type of solicited collection. It certainly implies a moderate use of this faculty on the part of the bishop.'"[1]

b) This type of collection is extended to all churches and oratories that are in fact usually open to the faithful within the jurisdiction of the local ordinary, even though they may belong to religious institutes; there-

1. F. AZNAR, *La administración de los bienes temporales de la Iglesia. Legislación universal y particular española* (Salamanca 1984), p. 93; cf. *Comm.* 12 (1980), p. 405.

fore places outside the jurisdiction of the local ordinary are also included in this type of collection.

c) The proceeds must be sent to the diocesan curia. The purpose of these special collections must be for specified parish, diocesan, national, or universal works. Canon 791 refers to the annual collection *pro missionibus*.

In this matter the necessary coordination is to be expected between the faculties of the local ordinary specified in this canon and the normative faculties recognized in c. 1262.

1267 **§ 1. Nisi contrarium constet, oblationes quae fiunt Superioribus vel administratoribus cuiusvis personae iuridicae ecclesiasticae, etiam privatae, praesumuntur ipsi personae iuridicae factae.**

§ 2. Oblationes, de quibus in § 1, repudiari nequeunt nisi iusta de causa et, in rebus maioris momenti, de licentia Ordinarii, si agitur de persona iuridica publica; eiusdem Ordinarii licentia requiritur ut acceptentur quae onere modali vel condicione gravantur, firmo praescripto can. 1295.

§ 3. Oblationes a fidelibus ad certum finem factae, nonnisi ad eundem finem destinari possunt.

§ 1. Unless the contrary is clear, offerings made to Superiors or administrators of any ecclesiastical juridical person, even a private one, are presumed to have been made to the juridical person itself.

§ 2. If there is question of a public juridical person, the offerings mentioned in § 1 cannot be refused except for a just reason and, in matters of greater importance, with the permission of the Ordinary. Without prejudice to the provisions of Can. 1295, the permission of the Ordinary is also required for the acceptance of offerings to which are attached some qualifying obligation or condition.

§ 3. Offerings given by the faithful for a specified purpose may be used only for that purpose.

SOURCES: c. 1536

CROSS REFERENCES: cc. 128, 1261, 1287 § 2, 1290–1294, 1301

COMMENTARY

Daniel Tirapu

This canon concerns spontaneous offerings that the faithful may make on their own initiative, without being specifically asked, and especially concerns donations. It is closely related to c. 1290, because a donation is typically a contract in secular law.

1. A donation is a gratuitous contract by which the ownership of the donor's patrimonial goods is transferred freely to another who accepts it. Such contracts may be divided into verbal and tangible, pure and not pure, gratuitous and remunerative, *inter vivos* and *mortis causa*. "Current

ecclesiastical legislation has suppressed the previous c. 1536 of the *CIC* 1917 which made explicit reference to the destination of the offerings: it has been replaced by c. 1267 and cc. 1261 § 1 and 1262 which make general reference to voluntary offerings, within which one can group *donations.*"[1]

The elements inherent to a donation are: "*a*) fundamentally, a free gift, a grant of a patrimony to a gratuitous title; *b*) as regards its form, a donation must be carried out contractually through its acceptance on the part of the recipient; *c*) as regards its efficacy in transferring ownership or any other right, in the case of a tangible donation, it requires the fulfillment of the *traditio*; *d*) an irrevocable character."[2]

2. Current canon law regulates only certain aspects of donation; therefore c. 1290 will always have to be taken into consideration.

This canon regulates donations made to the Church. It establishes a presumption *iuris tantum* that the donation has been made to the juridical person, either public or private, and not to the superior or administrator who receives and accepts it. In the secular law of Spain manual donations have no other requisite except simultaneous delivery of the thing donated (a. 632, *Civil Code of Spain*).

3. Donations made to public juridical persons cannot be refused without just cause and, in matters of greater importance, without permission from the ordinary. Permission is also required to accept donations burdened with a qualifying obligation or condition. The reference to c. 1295 is that the norms of cc. 1291–1294 must be followed, for those norms are always binding when the juridical person's patrimony may be prejudiced. For López Alarcón, "the just cause shall be established in relation to the lawful origin of the goods, the good faith of the donor, the destination of the goods, the nature and figurative representation of the object, etc.; while the importance of the object will depend mainly on its value."[3] In the current Code there is no penalty established for anyone who illegitimately refuses a donation, although it is certainly reasonable to think that indemnification for damages might be demanded under c. 128. Aznar points out that "the clause established in c. 1536 § 4 *CIC*/1917 which did not allow the donation to be revoked once it had been accepted by the corresponding juridical person, has been suppressed (...). Indeed the following were adduced as causes for their revocable nature: the non-completion of the conditions or obligations imposed by the donor and accepted by the recipient; the uselessness of the donation; and whether the donor is survived by any descendents. The current norm has suppressed said clause pursuant to the provisions of c. 1267 § 3—faithfulness to the destination

1. F. AZNAR, *La administración de los bienes temporales de la Iglesia. Legislación universal y particular española* (Salamanca 1984), p. 113.
2. Ibid., pp. 113–114.
3. M. LÓPEZ ALARCÓN, commentary on c. 1267, in *Pamplona Com.*

imposed on the donation by the donor—to the norms contained in c. 1301 § 3—the right of the ordinary—and to the established civil norms."[4]

The text does not refer to the refusal of donations by private juridical persons because in that case the statutes of each individual would have to be followed within the general limits and the spirit of taxation in the Code's norms.

4. Paragraph 3 establishes that donations for a specific purpose may be used only for that purpose. In case of doubt, it should be remembered that the ordinary is the executor of all pious dispositions (c. 1301). The faithful must be told of the use of the goods they donate for specific purposes (c. 1287 § 2). In any case, the nature of offerings that are pious dispositions are not the subject of this canon.

5. By virtue of the reference in c. 1290, secular norms must be followed while still following special canonical norms. Therefore, it will be useful to explain the general framework of Spanish law on the matter of donations, with reference to the corresponding articles of the Civil Code of Spain:

a) in arts. 621 and 625 the capacity required to donate and accept donations is established.

b) acceptance is required (a. 618).

c) the form required for donations is regulated depending on whether they are real (public deed: arts. 618, 623, 632 and 633) or personal property (in writing).

d) there are special references for donations between spouses and certain donations made in favor of heirs (arts. 1336–1343, 676).

e) in the Agreement on Financial Affairs between the Spanish state and the Holy See there are also a number of exemptions and deductions in donations and patrimonial transfers for ecclesiastical purposes and entities (*Acuerdo sobre Asuntos económicos*, January 3, 1979, arts. IV, 1 c, and IV, 2).

4. F. AZNAR, *La administración...*, cit., p. 115.

1268 Praescriptionem, tamquam acquirendi et se liberandi modum, Ecclesia pro bonis temporalibus recipit, ad normam cann. 197–199.

The Church recognises prescription, in accordance with Cann. 197–199, as a means both of acquiring temporal goods and of being freed from their obligations.

SOURCES: cc. 1508, 1509

CROSS REFERENCES: *cc. 197–199, 1257, 1269–1270*

COMMENTARY

Daniel Tirapu

1. The Church accepts acquisitive (*usucapion*) and extinctive (or negative) prescription as methods of acquiring temporal goods, pursuant to the norms regulating prescription in cc. 197–199 of book I. This institution, regulated by the norms of canon law, in c. 197 is expressly remitted to the legislation of each country. Molano says that "prescription is a method of acquiring or losing rights and of freeing oneself from obligations. Prescription is operative if a series of requirements are fulfilled, such as: *a*) suitable material; *b*) continued possession for the period prescribed by the law; *c*) the time established by law; *d*) a just title or reason, usually a juridical act or transaction which will enable the ownership or right to be transferred to another, which in principle, must be proved; *e*) good faith."[1]

2. Current canon law—as indicated in c. 197—"canonizes" secular legislation on this matter with the characteristics and specifications expressly established in the Code.

In Spain, arts. 1930–1975 of its Civil Code govern in this matter:

a) prescription is admitted as a method of acquiring ownership and other authentic rights and as a method of extinguishing rights and actions of any kind (arts. 1930, 1931).

The scope of *usucapion* or acquisitive prescription includes all authentic rights; the legal capacity required is the same as the legal capacity required for acquisition by any other legal method. The things that may be prescribed include the things that are within the business of humankind (a. 1936);

1. E. MOLANO, commentary on c. 197, in *Pamplona Com.*

b) possession must be by title of ownership, peaceful and uninterrupted. "Possession by title of ownership is when the thing has been acquired by a method that is sufficient to transfer the ownership of or authentic rights thereto. *Peaceful* possession is opposed to actual violence or possession where the effects have not yet been extinguished. *Clandestine* possession is also a transitory defect. Finally, the Civil Code specifically indicates precisely the causes for *interruption*: natural interruption—when for any reason possession ceases for more than one year—and civil interruption—under a legal claim against the owner that ends with a condemnatory sentence against the owner, and for the recognition by the actual owner of rights opposed to his possession"[2];

c) a just title and good faith are required (a. 1940) for ordinary acquisitive possession and authentic rights. The time periods vary depending on whether the prescription is ordinary or extraordinary and the type of goods (personal or real property, arts. 1955–1959): for ordinary prescription, three years for moveable goods and ten years for immoveable goods among parties present, twenty years among parties absent; for extraordinary prescription, six years for moveable goods and thirty years for immoveable goods.

3. In canonical patrimonial law, everything tangible and intangible, personal and real, public and private may be prescribed, taking into account the provisions of c. 199 which lists some matters not subject to prescription. A necessary condition for the validity of canonical prescription is that there be a just title, and a just title "is understood to be a legal purpose for transferring ownership of a thing and, consequently, it is the foundation or basis by which the owner deems in good faith that the thing he owns may be justly retained as his own. Therefore, there are as many titles as may be legal to acquire ownership. The title may be just; it may be *coloratus*, where the rights per se may be transferred, but in fact only appear to be transferred due to a hidden defect in the titulus; existing or putative, where it is believed to be probable because of an erroneous opinion; and presumptive."[3] Canon 198 requires good faith at the beginning and during the entire period of time required for the validity of prescription (*mala fides superveniens nocet*).

Specific norms on ecclesiastical patrimonial prescription are established in cc. 1269 and 1270.

2. F. AZNAR, *La administración de los bienes temporales de la Iglesia. Legislación universal y particular española* (Salamanca 1984), p. 121.

3. Ibid., pp. 125–126.

1269 **Res sacrae, si in dominio privatorum sunt, praescriptione acquiri a privatis personis possunt, sed eas adhibere ad usus profanos non licet, nisi dedicationem vel benedictionem amiserint; si vero ad personam iuridicam ecclesiasticam publicam pertinent, tantum ab alia persona iuridica ecclesiastica publica acquiri possunt.**

Sacred objects in private ownership may be acquired by private persons by prescription, but they may not be used for secular purposes unless they have lost their dedication or blessing. If, however, they belong to a public ecclesiastical juridical person, they may be acquired only by another public ecclesiastical person.

SOURCES: c. 1510

CROSS REFERENCES: cc. 1171, 1212, 1222, 1270

COMMENTARY

Daniel Tirapu

1. Sacred objects are moveable or immoveable goods that by dedication or blessing have been designated for divine worship (c. 1171). They are not a special type of ecclesiastical goods since they may belong to physical or private ecclesiastical juridical persons or secular juridical persons, although they are subject to special treatment precisely because of their sacredness.

Aznar Gil points out that "consecration or blessing imprints spirituality upon the object itself and gives it a particular juridical status, distinguishing it from secular objects and keeping it from profane or improper use (c. 1171). The following are sacred objects: sacred images (c. 1188); sacred relics (c. 1190); sacred places dedicated to divine worship or burial of the faithful by blessing or dedication (c. 1205), such as churches (c. 1214), oratories (c. 1223), private chapels (c. 1226), shrines (c. 1230), altars (c. 1235), cemeteries (c. 1240), instruments or accessories for divine worship, etc.

"Sacred objects by their very nature must be treated reverently and must not be used profanely or improperly regardless of juridical ownership (cc. 1171, 1260). Based on the spiritual element that is united to the material element, they are beyond any financial valuation. Even repression does not destroy the right to their ownership. If the sacred objects are not ecclesiastical goods, the Church, given the innate nature of the objects, establishes a few special norms so as to guarantee their proper use

for as long as they maintain said status: the spiritual element of the sacred object must remain outside financial valuation, since it is invaluable. Sacred objects may be acquired by physical persons or private juridical persons provided that they are not used for profane purposes (c. 1269). Special norms are established for goods donated through a vow (c. 1292 § 2), etc.

"Sacred objects may lose their dedication and sacredness—that is, be deconsecrated—by decree of the ordinary (cc. 1212, 1222) designating them permanently for secular but not profane use, and by virtue of the same right if they are in great part destroyed (cc. 1212, 1222)."[1]

2. This present canon includes the legislation found in c. 1510 of *CIC*/1917 and indicates a series of norms for the prescription of sacred objects. During the codification process, there were some proposals along the lines of suggesting that prescription of sacred objects was not possible, but the proposals were not accepted.[2]

The following cases are covered:

a) sacred objects belonging to a public ecclesiastical juridical person may be acquired only by prescription by another person of the same kind. In this case the sacred objects are ecclesiastical goods and are therefore especially protected. Thus in this case the period of time for the prescription is the time indicated in c. 1270;

b) sacred objects belonging to private persons—physical or juridical, secular or ecclesiastical—may be acquired by prescription by private persons and also by a public ecclesiastical juridical person. In any case, the obligation is to not use them profanely unless they have lost their dedication or blessing (c. 1212).

1. F. AZNAR, *La administración de los bienes temporales de la Iglesia. Legislación universal y particular española* (Salamanca 1984), p. 37.
2. Cf. *Comm.* 12 (1980), pp. 460ff.

1270 Res immobiles, mobiles pretiosae, iura et actiones sive personales sive reales, quae pertinent ad Sedem Apostolicam, spatio centum annorum praescribuntur; quae ad aliam personam iuridicam publicam ecclesiasticam pertinent, spatio triginta annorum.

Immovable goods, precious movable goods, rights and legal claims, whether personal or real, which belong to the Apostolic See, are prescribed after a period of one hundred years; for those which belong to another public ecclesiastical juridical person, the period for prescription is thirty years.

SOURCES: c. 1511

CROSS REFERENCES: cc. 1171, 1189, 1269, 1292, 1295

COMMENTARY

Daniel Tirapu

Special prescription periods are established for the goods described: immovable goods, precious moveable goods, rights and legal actions—both personal and real—excluding non-precious movable things. All other cases shall be governed by the periods of time provided by the secular laws of each country. Special prescription periods of one hundred years are established for the Holy See, and thirty years for ecclesiastical public juridical persons:

a) By precious goods or a precious thing is meant goods that have considerable value because of artistic, historical, or material value, according to the definition in c. 1497 § 2 of *CIC*/1917. Such goods may belong to public or private juridical persons but because of their special status, especially with regard to their alienation and protection, they are in all cases subject to general canon law (cc. 1189, 1292 § 2, 1295). The current Code contains no exact definition of a precious thing, although there are allusions in cc. 1189 and 1292. In the opinion of Aznar Gil, "This concept was deliberately left ambiguous to be refined and corrected in detail at a later time. We therefore believe that the sources of preciousness would come, if not exclusively, then principally from artistic or historical value, since worship is the origin of sacred goods and financial value affects all ecclesiastical goods (c. 1292 § 2). Hence it would almost be possible to identify precious goods with the goods belonging to the Church's cultural patrimony ... A determination must then be made using the criteria issued

on this matter by the Holy See, the bishops' conference or the diocese involved and the criteria established in civil legislation"[1];

b) for a definition in Spanish law of movable and immovable things (personal and real property), arts. 334, 335 and 336 of the Civil Code of Spain will have to be consulted. The purpose of personal actions is the fulfillment of an obligation, whereas the purpose of real actions is related to a thing;

c) just as it is in c. 1511 of *CIC*/1917 and for the goods indicated, a different period of time is required depending on whether the property belongs to the Holy See or to another public juridical person (one hundred years and thirty years respectively). This means that "for third parties to acquire, through acquisitive prescription against the Holy See and public juridical persons, ownership and real rights over immovable goods and precious movable ones, one hundred years and thirty years respectively will have to pass. The same time periods will have to pass also for the extinction of personal and real rights belonging to these same persons. Since the text makes no reference to goods and rights belonging to third parties, the periods prescribed in the secular legislation would be in effect, and would apply also to the extinction of any legal actions that might be exercised by such third parties."[2] In the previous law, by privilege a hundred years' prescription period applied to the Friars Minor, the Capuchins and the Cistercians, and a sixty-year period to the Benedictines and the mendicants. Those periods may be considered to be valid under c. 4 of the current Code;

d) There is one important and delicate matter that in the final analysis depends upon the concordats with each country and the juridical status of canon law in each country; that is, whether the different countries should accept the Church's special prescription periods if they do not agree with the prescriptions established by civil law, or if they prevail regardless of their ecclesiastical nature.

1. F. AZNAR, *La administración de los bienes temporales de la Iglesia. Legislación universal y particular española* (Salamanca 1984), p. 38.
2. M. LÓPEZ ALARCÓN, commentary on c. 1270 in *Pamplona Com.*

1271 Episcopi, ratione vinculi unitatis et caritatis, pro suae dioecesis facultatibus, conferant ad media procuranda, quibus Sedes Apostolica secundumtemporum condiciones indiget, ut servitium erga Ecclesiam universam rite praestare valeat.

By reason of their bond of unity and charity, and according to the resources of their dioceses, bishops are to contribute to the provision of those means which the Apostolic See may from time to time need to exercise properly its service to the universal Church.

SOURCES: *LG* 23; *DPMB* 46–49, 138

CROSS REFERENCES: cc. 1260, 1262, 1266

COMMENTARY

Daniel Tirapu

This text states the generic and indeterminate obligation of the diocesan bishops to attend to the material and financial needs of the Holy See.

There is a direct reference to the bonds of charity and unity that must preside over the relationship of the bishops with the Roman Pontiff, and the particular churches with the universal Church. "Insofar as the duties of their office allow it, all bishops must cooperate with each other and with the Successor to Saint Peter, to whom the duty of propagating the Christian faith has been entrusted. They must therefore use all their powers to supply missions with physical workers as well as spiritual and material help, directly or by exhorting the ardent cooperation of the faithful" (*LG* 23).

Certainly, the Holy See, because of the burdens engendered by the internationalization of the Church and the collegial system that implements it, requires special financial aid. The *DPMB* 46 also indicated the bishop's obligation to promote *Peter's pence* for such purposes.

Lamberto de Echeverría comments that "although nothing is said in cc. 399 and 400, a very ancient and almost universal custom requires contributing to the needs of the Holy See upon the occasion of an *ad limina* visit."[1]

1. L. DE ECHEVERRÍA, commentary on c. 1271, in *Salamanca Com*

Some type of tax might have been imposed, but the solution proposed in this canon was preferred. It urges and relies upon a solicitude for all the Church by the bishop of each diocese, thus also permitting the financial situation and needs of each diocese to be taken into account. These contributions may be spontaneous or in answer to a request and must be given according to the resources of each diocese and to the varying circumstances of the Holy See's needs. It is now customary for annual collections to be taken up in the dioceses for the needs of the Holy See and for specific pontifical works (see cc. 1262 and 1266).

1272 **In regionibus ubi beneficia proprie dicta adhuc exsistunt, Episcoporum conferentiae est, opportunis normis cum Apostolica Sede concordatis et ab ea approbatis, huiusmodi beneficiorum regimen moderari, ita ut reditus, immo quatenus possibile sit ipsa dos beneficiorum ad institutum, de quo in can. 1274 § 1, paulatim deferatur.**

In those regions where benefices properly so called still exist, it is for the bishops' conference to regulate such benefices by appropriate norms, agreed with and approved by the Apostolic See. The purpose of these norms is that the income and as far as possible the capital itself of the benefice should by degrees be transferred to the fund mentioned in Can. 1274 § 1.

SOURCES: CodCom Resp., 24 nov. 1920 (*AAS* 12 [1920] 577); *CD* 28; *PO* 20, 21; *ES* I, 8, 18, 21; PAULUS PP. VI, m. p. *Ad hoc usque tempus,* III (*AAS* 61 [1969] 226–227); PCIDSVC Resp., 3 iul. 1969 (*AAS* 61 [1969] 551)

CROSS REFERENCES: c. 1274

COMMENTARY

Daniel Tirapu

1. Canon 1409 *CIC*/1917 defined an ecclesiastical benefice as a juridical entity constituted or established in perpetuity for a competent ecclesiastical authority and consisting of a sacred office and the right to receive the income from the endowment attached to the office. "This complex concept presented two essential and closely related elements: the spiritual—the sacred office—and the material—the right to the income from the endowment. For it to be a proper ecclesiastical benefice, there were two more requisites: establishment by the competent ecclesiastical authority and perpetuity, which was the purpose of establishing it.

"...At the beginning of the benefice system and for many centuries the endowment was constituted by immovable goods, houses and rural properties linked to the support of a clergyman who held an ecclesiastical office (parish, etc.). With the development of moveable property, however, and especially with the loss of the Church's territorial patrimony as a result of confiscation during the last century, canon law put its classic flexibility to the test; it admitted as beneficial endowments not only moveable or immoveable goods belonging to the benefice, but also stole fees, choir

distributions and fixed contributions owed by some family or moral person (endowments from the State, for example). In a veritable display of imagination, there were even *fixed and voluntary* contributions from the faithful received by reason of the office (c. 1410 *CIC*/1917)."[1]

The following may be listed among the basic reasons supporting suppression of the benefice system: the diminished importance of the work; the failure of the system to be equitable, for it gave rise to obvious inequalities among the clergy; and also the possible interference with a bishop's freedom to confer diocesan offices (*CD* 28).

Thus *Presbyterorum ordinis* 20, notes "that the greatest importance must be attributed to the function filled by sacred ministers. Therefore the so-called beneficial system must be abandoned, or at least reformed in such a way that the benefice part, or the right to the yield from the endowment of the benefice, be considered as secondary and attributed by law first to the ecclesiastical office itself; and the office surely must henceforth be understood to be a duty conferred permanently to carry out a spiritual purpose." So in *Ecclesiae sanctae* 8, Paul VI commended reform of the benefice system to the Commission for revising the *CIC*; and he gave the bishops the opportunity to provide an equable distribution of goods, including income from benefices. With this in mind *Presbyterorum ordinis* 21 recommended creating a diocesan fund to support the clergy. In the Vatican II document, as Martín de Agar writes, it was unequivocal that there would be a gradual "substitution of the benefice system by other methods of remunerating the clergy that would also accord more with the theological and sacramental bonds between the various degrees of priesthood (episcopate-presbyterate) and the relationship of cooperation and service that institutionally exemplifies those bonds. The relationship from which the right to remuneration arises is no longer polarized as office-benefice-title; there is now a more direct relationship between the diocese and the clergy that serve it, and the diocese is obligated to support the ministers appropriately."[2]

Canon 1272 is the practical and juridical result of what has been written above. It is the only place in the Code that is concerned with benefices, whereas *CIC*/1917 devoted eighty canons to the system. This canon covers its gradual disappearance as an organizational-patrimonial system in the Church and its also gradual conversion to a diocesan system for remunerating the clergy (c. 1274). López Alarcón explains that "the transitory situation to which the existence of numerous ecclesiastical benefices gives rise is solved with extreme caution in order that any indiscriminate suppression might be avoided. Existing benefices are not declared to be

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1. A. MOSTAZA, "Derecho Patrimonial Canónico," in *Derecho Canónico*, I (Pamplona 1974), p. 319.
2. J.T. MARTÍN DE AGAR, "Bienes temporales y misión de la Iglesia," in *Manual de Derecho Canónico*, 2nd ed. (Pamplona 1991), p. 663.

extinguished nor are they therefore in a stage of liquidation; it is simply recommended that the respective bishops' conferences should rule on the governance of the benefices still in existence, by means of pertinent norms established in agreement with the Holy See and approved by it. This new system of governance affects only benefices in the strict sense, that is, those where the endowment or patrimonial substance of the benefice was constituted in the first place by landed property."[3]

2. The current situation of ecclesiastical benefices as indicated in c. 1272 is as follows:

a) with regard to existing benefices, "bishops' conferences shall establish with the Holy See appropriate norms for bringing about their suppression, but at the same time they must adapt the extinction to the situation of each benefice. The circumstances should be carefully examined on an individual basis, especially relatively to the situation of the goods and the attitude of the holder of the benefice, of the founders and patrons, and of interested third parties. Once the situation of each benefice has been considered, some may be suppressed and the extinction of others delayed until a more appropriate date."[4]

b) the canon also stipulates that the income and, if possible, the endowment for the benefice should gradually pass to the diocesan fund referred to in c. 1274. López Alarcón says that "the mixing of the income from benefices with this fund will not create serious difficulties; but the attribution of the capital while the benefice still exists may give rise to the same reluctance and problems as suppression; that is why the canon uses the expression *quatenus possibile*. In any case, mixing the capital with the diocesan fund can be carried out while keeping the benefice in existence, provided the fund assumes the obligations of the benefice, that is, provides for the remuneration of the incumbent cleric, whether this mixing of funds is in the form of a patrimony separate from the diocesan fund itself—administered separately—or they are integrated or merged with the fund without any distinction. Merger may be carried out all at once, or gradually, the obligations being transferred to the diocesan fund in proportion to the amount and nature of the goods transferred. Merger may entail the modification of the benefice, either by the extinction or reduction of the obligations or by the adaptation of the subsistence income to the needs of the beneficiary."[5]

c) the question may be raised as to whether the beneficiary continues in his acquired rights after the benefice has been suppressed. For López Alarcón "Vatican Council II introduced a substantial change on this point when it prescribed the relinquishment of the benefice system, with

3. M. LÓPEZ ALARCÓN, commentary on c. 1272, in *Pamplona Com*
4. Ibid.
5. Ibid.

priority given to the ecclesiastical office itself while the remuneration of the incumbents—which will be granted *pro officio* and not *pro beneficio* (*PO* 20–21) is regulated to a subordinate place. Thus, the system of support through benefices will have to be replaced, once the benefice is suppressed, by the system determined in the new norms. Such a system would respect the right to a fair remuneration for the holder of the extinguished benefice and any other acquired rights still in existence."[6] In any case, the question is still problematic.

d) although the text does not expressly state so, it is evident that new benefices may not be established since c. 1272 is the norm for transitionally regulating the gradual suppression of the benefice system.

6. Ibid.

TITULUS II
De administratione bonorum

TITLE II
The Administration of Goods

INTRODUCTION

Zoila Combalía

The Pope informed the Commission of two elements that were to guide their work in revising the *CIC*. "In the first place, it was not simply to make a new collection of the laws as had been done in the time of the Pio-Benedictine Code; foremost, it was to reform the laws to adapt to a new way of thinking and to new demands, even though it was to maintain the ancient law as its foundation. Secondly, in the revision, constant attention was to be paid to the spirit of the decrees and acts of the Second Vatican Council since in them were to be found the features of the new legislation. This was either because rules had already been enacted which directly concerned new institutions and ecclesiastical discipline, or because the doctrinal riches of the Council, which had greatly contributed to the pastoral life, had to find their effects and requisite influence on canonical legislation" (*CIC*, *Praefatio*). These elements are seen especially in the new canonical regulation in book V and specifically, in tit. II on the administration of the Church's temporal goods. There are to be found—literally, at times—the principles and provisions marked by Vatican Council II, in particular in the Decree *Presbyterorum Ordinis* (cf. *PO* 8, 17, 20, 21; also *CD* 28, 31; *ES* I, 8).

Among the characteristics that define the new system for administering the goods designated by Vatican Council II and canon law, we may point out the following:

a) The gradual suppression of the benefice system led to a new system for remunerating the clergy and satisfying the other financial needs of a diocese. The new system is more in accord with current financial circumstances and with the theological and juridical principles that link the presbyterate with the diocese. This system is the one basically outlined in c. 1274.

b) The canons that concern management of the ecclesiastical patrimony are shaped by the evangelical spirit of charity and poverty, the obligation of the faithful to contribute to the support of the Church, aid to the most needy, unity and cooperation among the various particular churches, etc. In this matter especially there is "a need for effective cooperation among the dioceses—a manifestation of the *communio ecclesiarum*—to permit Christian communication of goods and a coordination of efforts in facing common juridical and economical circumstances."[1]

c) Care was also taken to ensure that such cooperation would not mean breaking up the constitutional autonomy that belongs to each particular church. Defense of that autonomy marked some of the reforms in the initial 1977 draft. Thus, theoretically, a greater role had been given to intervention by bishops' conferences, but in the end it was agreed that the powers attributed to them could not detract from the bishops' right to govern their particular churches as ordinary and immediate pastors. The consultants had expressed themselves in the following manner: "Consultores concordes sunt ut e Schemate expungatur quidquid implicare possit vigilantiam Conferentiae supra Episcopos, vel attentare possit Episcoporum iuri regendi suas Ecclesias uti pastores ordinarii et inmediati. Attamen, attentis documentis Concilii Vat. II, praevideri debent quaedam normae, quibus melior coordinatio assequatur ope Episcoporum Conferentiarum circa regimen bonorum ecclesiasticorum quod attinet ad peculiaria quaedam instituta."[2] That is why some of the powers originally given to the bishops' conferences in each country were cut out, for example, decreeing norms for administering the mass of goods coming from different dioceses.[3]

d) Perhaps one of most outstanding characteristics in the regulation of the administration of ecclesiastical goods is the importance given to the principle of subsidiarity in this matter. Subsidiarity is among the principles approved as a basis for the process of revising the Code: "in virtue of this principle and provided that legislative unity and universal and general law are respected, provision for the interests of individual institutes by particular laws and a healthy autonomy of particular executive power is recognized as proper and necessary. Based on this principle the new Code entrusts to particular laws or to executive power all that is not required for the unity of the discipline of the universal Church, so as to suitably provide for a healthy 'decentralization,' while avoiding the danger of disaggregation or the establishment of national Churches" (*CIC, Praefatio*).

In accordance with that subsidiarity, the canons we are commenting on refer constantly to the norms of private law and thus achieve greater

1. J.T. MARTÍN DE AGAR, "Bienes temporales y misión de la Iglesia," in *Manual de Derecho canónico*, 2nd ed. (Pamplona 1991), p. 720.
2. *Comm.* 12 (1980), p. 391.
3. Cf. ibid., p. 413.

realism and effectiveness in managing ecclesiastical patrimony. The Code sets forth the principles and generic structures with exquisite respect for diocesan and regional provisions.

e) Closely related to the preceding idea is another note that characterizes regulation of patrimonial management: the Code constantly remits to the secular law of each country. Some examples of this are cc. 1274 § 5, 1284 § 2,2°–3°, 1286,1°, etc.

As Lombardía points out, "the Catholic Church exercises its jurisdiction over the same persons who form a part of the various States, and to whose laws they are subject. This fact gives a special quality to the citizens of each State as a logical consequence of the effective action of law. The Church, when it makes laws for its members on points more closely related to civil law, does not forget that special quality; through these norms it adapts perfectly to the situation of citizens among whom there are people subject to canon law."[4] There is no doubt, in questions of patrimonial administration, that this need for agreement and harmony between canon and civil law is especially pressing.

4. P. LOMBARDÍA, "El canon 1529: problemas que en torno a él se plantean," in *Revista Española de Derecho Canónico* 19 (1952) p. 112.

1273 Romanus Pontifex, vi primatus regiminis, est omnium bonorum ecclesiasticorum supremus administrator et dispensator.

The Roman Pontiff, by virtue of his primacy of governance, is the supreme administrator and steward of all ecclesiastical goods.

SOURCES: c. 1518

CROSS REFERENCES: cc. 331–333, 1256, 1257 § 1

COMMENTARY

Zoila Combalía

1. The Roman Pontiff is considered to be the supreme administrator and steward of ecclesiastical goods.

With regard to the distinction between administration and stewardship, De Echeverría affirms that the Pope, "as supreme administrator: *a*) issues norms; *b*) supervises extraordinary acts; *c*) is informed every five years by the bishops (upon the occasion of the *ad limina* visit) and the general superiors (quinquennial reports) of how their respective administrations are running. As steward, the Pope has the function of unifying the great diversity of patrimony that such an abundance of titles implies; he stipulates transfers between some of them, and under extraordinary circumstances, may even condone unduly made appropriations, publicly or in conscience (by means of the Apostolic Penitentiary)."[1]

2. It is significant that canon law sets forth the Pope's supremacy as administrator and steward by virtue of his primacy of governance, and not of *dominium eminens*, as some authors maintained in a famous and historical polemic (which has since ceased).

From the feudal concept of property law there arose a controversy among canonists and theologians. For theologians, the sacred status of ecclesiastical things implied that they had no other owner but God. St. Thomas was in agreement with this idea that "the f is the principle steward of the Church's goods, but they do not belong to him as they do to an owner and authentic possessor."[2] For some canonists, however, the Pope's power is a true dominative power. From civilists they took the distinction

1. L. DE ECHEVERRÍA, commentary on c. 1273, in *Salamanca Com.*
2. *S. Th.*, II–II, q. 100, a. 1 ad 7.

between two kinds of ownership coexisting in the same thing: one in the field of private law and the other—*dominium eminens*—in the field of public law, corresponding to a prince or emperor. It was *dominium eminens* that is attributed in canon law to the Roman Pontiff.[3]

In *CIC*/1917 the doctrine of juridical personality was incorporated, recognizing that "ownership of the goods belongs, under the supreme authority of the Holy See, to the moral person that legally acquired them." (c. 1499 § 2). Therefore, when c. 1518 of *CIC*/1917 had the Roman Pontiff as the supreme administrator and steward of all ecclesiastical goods, there were reasonable motives for maintaining that this condition was his, not by virtue of dominative power, but by jurisdiction. Nevertheless, some authors continued to insist that supreme administration derived from the eminent domain of the Pope's authority.[4]

The initial project to reform the Code accepted the Roman Pontiff's competence *vi primatus iurisdictionis*. Opposed to this version, some suggested that the specification *vi primatus iurisdictionis* be eliminated. They alleged that it "easily reduces the competence of the Roman Pontiff over temporal goods to the eminent domain recognized by secular powers. It is certainly a broader expression to say that the Roman Pontiff is the supreme administrator and steward than simply supreme in jurisdiction." However, the expression was retained and the consultants stated that "these words—*vi primatus iurisdictionis*—qualified the supreme administrator and steward's type of power, a power that is not dominative as if the Roman Pontiff were owner of the ecclesiastical goods. But by virtue of this power, the Supreme Pontiff may dispose of ecclesiastical goods in fulfillment of the purposes for which the Church owns the goods." With regard to the terms used, it was proposed to say *vi primatus regiminis* instead of *iurisdictionis*, and so it remained in the final writing.[5]

As we have said, the current c. 1273 avoids the controversy. The supreme *auctoritas* of the Roman Pontiff over juridical persons and over ownership and other real titles does not mean that he is the owner. Ownership of ecclesiastical goods[6] corresponds to the juridical person holding title thereto, which by virtue of its public character, actuates the Church's purposes in the name of the Church and commits it to a certain degree as a social institution (cf. c. 116[7]). From there derives its submission to the supreme jurisdiction of the Roman Pontiff. "It is in the final analysis *potestas iurisdictionis*," concludes López Alarcón, "as projected over the

3. Regarding this issue, cf. F.R. AZNAR GIL, *La administración de los bienes temporales de la Iglesia* (Salamanca 1993), pp. 83ff.
4. Cf. M. BONET MUIXI, "Gestión del patrimonio eclesiástico," in *El patrimonio eclesiástico* (Salamanca 1950), p. 129. Cf. also S. ALONSO MORÁN, in *Comentarios al Código de Derecho canónico*, III (Madrid 1964), p. 164.
5. Cf. *Comm.* 12 (1980), pp. 412–413.
6. Regarding the concept of ecclesiastical goods, cf. c. 1257 §1.
7. Cf. E. MOLANO, commentary on c. 116, in *Pamplona Com.*

patrimony of ecclesiastical juridical persons, that identifies this supreme ownership in public law that enters into the composition of the juridical structure of the ownership relationship, controls its use, resolves controversies and distributes the goods in exercising the superior functions of ecclesial unity, solidarity among juridical persons and social justice."[8]

For the present author, the prescription in c. 1273 does not mean that the Pope's supreme administration and stewardship does not also include the goods of private juridical persons. This extension finds support in c. 1256, which establishes that, whoever the titular juridical person may be—public or private—ownership of the goods is his under the supreme authority of the Roman Pontiff.[9]

3. Normally the Pope exercises his patrimonial competence in acts of a normative nature by which he establishes the legal regimen to which the administration of ecclesiastical goods must be subject. But he could also intervene directly in the administration of the goods of a public juridical person; in that case, he would be limiting the competence of any other inferior body. In fact, because he is considered to be supreme administrator, the Roman Pontiff may exercise all acts of ordinary and extraordinary administration, excluding, when he exercises this power, by reason of supremacy, the powers of the inferior administrator. The Pope actually does not exercise his supreme power of administration as the supreme body of a superstructure, but as the head of the body of the same moral person, by virtue of his immediate episcopal powers.

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8. M. LÓPEZ ALARCÓN, "La titularidad de los bienes eclesiásticos," in *El Derecho patrimonial canónico en España* (Salamanca 1985), p. 18. Cf. F.R. AZNAR GIL, *La administración...*, cit., pp. 87–88, who counters that the power of the Roman Pontiff is not sovereign, but neither is it purely jurisdictional, given that determined administrative acts would not, in consequence, follow: it is rather a matter of "a concentrated jurisdictional power."

9. M. LÓPEZ ALARCÓN, "La titularidad...," cit., p. 19.

1274 **§ 1. Habeatur in singulis dioecesibus speciale institutum, quod bona vel oblationes colligat eum in finem ut sustentationi clericorum, qui in favorem dioecesis servitium praestant, ad normam can. 281 provideatur, nisi aliter eisdem provisum sit.**

§ 2. Ubi praevidentia socialis in favorem cleri nondum apte ordinata est, curet Episcoporum conferentia ut habeatur institutum, quo securitati sociali clericorum satis provideatur.

§ 3. In singulis dioecesibus constituatur, quatenus opus sit, massa communis qua valeant Episcopi obligationibus erga alias personas Ecclesiae deservientes satisfacere variisque dioecesis necessitatibus occurrere, quaque etiam dioeceses divitiores possint pauperioribus subvenire.

§ 4. Pro diversis locorum adiunctis, fines de quibus in §§ 2 et 3 aptius obtineri possunt per instituta dioecesana inter se foederata, vel per cooperationem aut etiam per convenientem consociationem pro variis dioecesibus, immo et pro toto territorio ipsius Episcoporum conferentiae constitutam.

§ 5. Haec instituta, si fieri possit, ita constituenda sunt, ut efficaciam quoque in iure civili obtineant.

§ 1. In every diocese there is to be a special fund which collects offerings and temporal goods for the purpose of providing, in accordance with Can. 281, for the support of the clergy who serve the diocese, unless they are otherwise catered for.

§ 2. Where there is as yet no properly organised system of social provision for the clergy, the bishops' conference is to see that a fund is established which will furnish adequate social security for them.

§ 3. To the extent that it is required, a common reserve is to be established in every diocese by which the bishop is enabled to fulfil his obligations towards other persons who serve the Church and to meet various needs of the diocese; this can also be the means by which wealthier dioceses may help poorer ones.

§ 4. Depending on differing local circumstances, the purposes described in §§ 2 and 3 might better be achieved by amalgamating various diocesan funds, or by cooperation amoung various dioceses, or even by setting up a suitable association for them, or indeed for the whole territory of the bishops' conference itself.

§ 5. If possible, these funds are to be established in such a manner that they will have standing also in the civil law.

SOURCES: § 1: SCCouncil Litt. circ., 25 feb. 1950; SCCouncil Decl., 17 dec. 1951 (*AAS* 41 [1952] 44); *LG* 13, 23; *CD* 6, 21, 31; *PC* 13; *AG* 17, 38; *PO* 8, 20, 21; *ES* I, 8, 11, 20; *ES* III, 8, 19; *SDO* IV, 19–21; *DPMB* 117, 134–138
§ 2: SCCouncil Litt. circ., 1 iul. 1941; SCCouncil Regolamento della Cassa di Sovvenzioni per il Clero secolare d'Italia, 15 iun. 1943

CROSS REFERENCES: cc. 115 § 3, 281, 1272, 1303,2°

COMMENTARY

Zoila Combalía

This precept includes the important modifications introduced by Vatican Council II to the Church's financial system (cf. *PO* 21; *ES* I, 8).[1] The gradual abandonment of the benefice system required new methods of organization that are now regulated according to the following:

1. *Support of the clergy.* To support the clergy providing service in the diocese (cf. c. 281 § 1), the creation of a diocesan fund is stipulated.

The existence of this fund is stated in the Code in a way that respects the liberty of the diocesan bishop to establish another method of attending to remuneration of the clergy.

With regard to the diocesan character of this fund, it has a deeper juridical theological foundation than a merely organizational issue: the ministerial linking of the presbyterate with the diocese and cooperation in the bishop's pastoral task.[2] In this way it is understood that § 4 does not include the fund for supporting the clergy among the assumptions of interdiocesan cooperation.

In Spain, the bishops' conference has issued norms to develop the regulation of these funds. Thus, with regard to its juridical nature, it is determined that the fund "may take the form, at the discretion of the diocesan bishop, of either an autonomous pious foundation in accordance with c. 155 § 3, or an entity whose goods will be under the name of the diocese itself, although with full independence in accounting."[3]

1. Cf., for a deeper explanation the Council's motives, F.R. AZNAR GIL, *La administración de los bienes temporales de la Iglesia* (Salamanca 1993), pp. 309–311.
2. Cf. J.T. MARTÍN DE AGAR, "Bienes temporales y misión de la Iglesia," in *Manual de Derecho Canónico*, 2nd ed. (Pamplona 1991), p. 721.
3. CBS, II° General Decree, December 1, 1984, a. 10, in *BOCEE* 6 (1985), pp. 63–65.

As for the goods that fund the institution, the decree mentions the following: *a*) goods and offerings contributed for that purpose; *b*) goods from pious foundations that are not autonomous, after a period established by the diocesan bishop in accordance with c. 1303, 2°; *c*) income and even capital from benefices still in existence in Spain (cf. c. 1272).[4]

With respect to administering the fund, it is stipulated that "if the option of simple independent accounting is chosen, it shall be performed by the same persons and bodies that administer the diocese's goods and shall be governed by the same norms. But if the fund has been established as an autonomous pious foundation, the diocesan bishop shall issue a decree setting forth the statutes of the public foundation that is titular of said fund and shall therein detail its governing bodies, administrative regimen, etc."[5]

2. *Social security for the clergy*. For the purpose of carrying out the provisions of c. 281 § 2—"suitable provision is likewise to be made for such social welfare as they may need in infirmity, sickness or old age"— § 2 provides that wherever the State does not include the clergy in social security, or does not provide enough, the bishops' conference shall see to it that there is an institution to take care of them.

In Spain, the General Social Security Law determines obligatory inclusion under the general regimen for workers employed by others or the equivalent (a. 61, 1) and provides that the government may establish said equivalence for any other persons for whom it deems it proper by reason of their activity (a. 61, 2h). In applying this precept, Royal Decree 2398/ 1977, of 27 August,[6] establishes that "the clergy of the Catholic Church and other ministers of other churches and religious confessions duly registered in the proper Register of the Ministry of Justice shall be included within the scope of the application of the General Regime on Social Security under the conditions determined by regulation. Diocesan clergy of the Catholic Church are made equivalent to workers employed by others for purposes of inclusion under the General Regime on Social Security, and in the form established by the Royal Decree" (a. 1).[7]

In the opinion of Martín de Agar, naming the bishops' conference as being responsible for seeing to the clergy's social security[8] does not necessarily imply that they are attributed with general competence in the matter, but that it will depend upon whether its members so decide. In any

4. Cf. ibid., a. 11.
5. Ibid., a. 13.
6. In *BOEE*, no. 224, from September 19, 1977.
7. This Decree was explained by the Order of December 19, 1977 (*BOEE* n 313, December 31). Cf. also: Circulation of January 11, 1978 (Boletín Oficial del Ministerio de Sanidad and Seguridad Social of January 4, 1978); Circulation of February 1, 1978 (Boletín del Mutualismo Laboral de febrero) and Resolución de la Dirección General de Régimen Jurídico de la Seguridad Social of October 27, 1979 (*BOEE* no. 272, from November 13, 1979).
8. On this point the Code also encompasses the provision made in *PO*, 21.

case, Martín de Agar emphasizes that care of the clergy if they become ill, etc., is an extension of the duty to see to their fitting remuneration that falls directly and immediately upon the diocese, and the clergy may always apply to the diocese to request care.[9] This is also true in the norms issued by other bishops' conferences. For example, in Mexico, although there is an official institution of the bishops' conference for the clergy's social security, it is expressly stated that "the preceding does not cover all the responsibility that each ordinary has to supplement the social security of its clergy."[10] Along these lines, the bishops' conference of El Salvador indicates that "if social security is lacking or insufficient, the diocesan bishop shall ensure that there is no lack of appropriate financial means to cover their needs, such as support, living quarters and health."[11]

De Echeverría points out that the bishops' conference may decide that this institution be merged with the institution for support of the clergy or even be limited to a department in the diocesan curia that conducts business related to the social security that the State has as a function benefiting the clergy.[12]

3. *Other diocesan needs*. The Code stipulates that a diocesan fund be established for remunerating other persons who serve the Church, for filling different diocesan needs, and for helping the poorest dioceses. Contrary to the two preceding funds, this fund is not formed as a juridical person based on patrimony, but simply as a fund.

This is a separate fund from the fund stipulated to support the diocesan clergy. Although there were proposals to unite the two, they were not accepted by the consultants incorporating the *mens* of Vatican Council II.[13] Aznar Gil, however, interprets it that "c. 1274 does not specifically require that three institutions stipulated therein be established, but with its purpose ensured, allows accommodation to the circumstances of each diocese. In my opinion, in view of the antecedents of the norm, its redaction and its purpose, it is neither prohibited nor required to constitute a single mass or common fund of diocesan goods, thus allowing the purposes there set forth to be more easily achieved."[14]

Following *Presbyterum ordinis* 21, "this common fund also should be made up mainly of moneys from the offerings of the faithful as well as from those coming from other sources to be determined by law." It seems

9. Cf. J.T. MARTÍN DE AGAR, "Bienes temporales...," cit., p. 722.
10. Cf. CBM, *Normas complementarias conforme al nuevo Código de Derecho canónico*, October 12, 1985.
11. Cf. *Decreto General de la Conferencia Episcopal de El Salvador sobre las Normas complementarias al nuevo Código de Derecho canónico*, July 15, 1987.
12. Cf. L. DE ECHEVERRÍA, commentary on c. 1274, in *Salamanca Com.*
13. For the sake of expediency it was added to maintain the distinctions that "in algunas diócesis ya se ha provisto por algún instituto o de otro modo a la sustentación de los clérigos and, por tanto, allí sólo debe constituirse la masa de que se habla in el párrafo tercero": cf. *Comm.* 12 (1980), p. 408.
14. F.R. AZNAR GIL, *La administración...*, cit., p 320.

clear that said goods will not be any different from the goods for the fund to remunerate the clergy. Therefore, López Alarcón emphasized that it would be in order to designate the destination in one common fund or the other of donations given to the diocese without a specified purpose.[15]

Diocesan norms should determine the option for a centralized regimen in the diocesan curia or for a decentralization in the different diocesan juridical persons for the financial management of personal services in the diocese and other needs (temples, charity, artistic and documental treasures, etc.).

4. *Interdiocesan cooperation.* For these other purposes of the diocese and for attending to the social security of the clergy, the Code takes the path of interdiocesan cooperation.

This cooperation may take three different forms, according to § 4: through amalgamated diocesan funds with centralized directing bodies; through simple cooperation among the diocesan institutions for organizing, supplying, and managing services, but with each bearing the costs incurred and preserving greater independence than in the case of federation; or by setting up a single institution as an association among several dioceses or even for the bishops' conference itself.

5. *Civil standing.* As for civil standing, in accordance with the principles that inspired the regulation under this title (see Introduction tit. II), § 5 provides that if possible these institutions should be established in such a manner as to obtain civil standing also.

15. M. LÓPEZ ALARCÓN, commentary on c. 1274, in *Pamplona Com.*

1275 **Massa bonorum ex diversis dioecesibus provenientium administratur secundum normas ab Episcopis, quorum interest, opportune concordatas.**

A reserve set up by a number of different dioceses is to be administered according to norms opportunely agreed upon by the bishops concerned.

SOURCES: *DPMB* 138

CROSS REFERENCES: c. 1274 § 4

COMMENTARY

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This canon expresses the principle of interdiocesan cooperation that, together with independence, inspires the financial structure of the dioceses (see Introduction to tit. II).

If the fund of goods comes from different dioceses—as happens, for example, in the cases listed in c. 1274 § 4—it is logical that the norms be agreed upon among the bishops concerned.

It may be of interest to note that the 1977 draft read as follows: "massa bonorum ex diversis dioecesibus provenientium administratur secundum normas a Conferentia Episcopali legitime statutas."[1] However, it appeared to the consultants more fitting that this power be attributed not to the bishops' conference but to the agreement of the bishops concerned, as expressed in the final writing of the canon. This modification may follow along the lines noted in the commentary on the initial draft, to ensure that the powers attributed by the new Code to the bishops' conference do not infringe upon the bishops' right to govern their particular churches as ordinary and immediate pastors.[2]

1. Cf. *Comm.* 12 (1980), p. 413.
2. Cf. ibid., p. 391.

1276 **§ 1. Ordinarii est sedulo advigilare administrationi omnium bonorum, quae ad personas iuridicas publicas sibi subiectas pertinent, salvis legitimis titulis quibus eidem Ordinario potiora iura tribuantur.**

§ 2. Habita ratione iurium, legitimarum consuetudinum et circumstantiarum, Ordinarii, editis pecularibus instructionibus intra fines iuris universalis et particularis, universum administrationis bonorum ecclesiasticorum negotium ordinandum curent.

§ 1. Ordinaries must carefully supervise the administration of all the goods which belong to public juridical persons subject to them, without prejudice to lawful titles which may give the Ordinary greater rights.

§ 2. Taking into account rights, lawful customs and the circumstances, Ordinaries are to regulate the whole matter of the administration of ecclesiastical goods by issuing special instructions, within the limits of universal and particular law.

SOURCES: § 1: c. 1519 § 1; SRR Decisio, 28 feb. 1919 (*AAS* 12 [1920] 85–91)
§ 2: c. 1519 § 2; SCCouncil Litt. circ., 20 iun. 1929 (*AAS* 21 [1929] 384–399); *SCCong* Normae, 30 iun. 1934 (*AAS* 27 [1934] 551–556); SCCouncil Litt. circ., 24 maii 1939 (*AAS* 31 [1939] 266–268); SCCouncil Litt. circ., 10 sep. 1960

CROSS REFERENCES: cc. 34, 134, 1278

COMMENTARY

Zoila Combalía

Canon 1276 attributes to the ordinary the competence for supervision and organization in administering the goods belonging to the public juridical persons who are under his authority.

Recognition of these generic powers must be interpreted together with other canons that assign specific powers to him. Among these are the following, listed by Martín de Agar: "Competence to perform extraordinary administrative acts (c. 1281), to give permission to litigate in civil courts (c. 1288), receive oaths from administrators (c. 1283,1°), give consent for investing the surplus (c. 1284 § 2,6°), receive annual reports

(c. 1287 § 1), give permission and establish bond for certain types of alienation (cc. 638 § 4 and 1292 § 2), and decide upon a lawsuit for illegal alienation (c. 1296). The ordinary is also the executor for all pious dispositions (c. 1301), with all powers associated by law with this office (cc. 1299–1310)."[1]

Now all of these taken together enable us to affirm that the ordinary is the mediate administrator of the ecclesiastical goods of all juridical persons under his authority.[2] This is true even though there is no precept generally attributing to him superior administration and dispensation of the goods, as c. 1273 does for the Roman Pontiff.

The same powers are listed in the current Code as were in c. 1519 of *CIC*/1917, except that the territorial criterion for determining competence ("ecclesiastical goods in his territory and not removed from his jurisdiction") is substituted by a personal criterion ("all the goods which belong to public juridical persons subject to them"). The two versions are also different in that the new Code does not limit the competence of the local ordinary as *CIC*/1917 did; instead, it uses the broader term of ordinary (cf. c. 134).

With regard to the content of the ordinary's competence, it is that of a mediate administrator:

a) First, vigilance—"the purpose of which is to ensure that the general principles for administering the Church's goods (preservation, avoiding risk and immoderate gain, adhering to the purposes, fulfillment of dispositions, etc.) are observed and, in addition and more immediately, compliance with universal, private and individual law on patrimonial management."[3]

With regard to lawful titles that may give the ordinary broader rights than those derived from vigilance, examples would be an apostolic delegation, a constitutive letter of a foundation, or the case of c. 637.

The task of vigilance may be delegated by the diocesan bishop to the financial administrator as prescribed in c. 1278.

b) Secondly, to the ordinary is attributed regulatory competence to organize, through instructions, the administration of the goods within his jurisdiction. Attribution of this power assumes that the task of the ordinary is not merely passive or to correct negligence and abuse, but that it fulfills an active function—also appropriate to his status as mediate administrator—of orientation and direction over the immediate administrator.

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1. J.T. MARTÍN DE AGAR, "Bienes temporales y misión de la Iglesia," in *Manual de Derecho Canónico*, 2nd ed. (Pamplona 1991), p. 708.
2. Cf. ibid., pp. 707 and 708.
3. Cf. ibid., p. 708.

As for the manner of performing his function, in addition to the generic limits to which the instructions are subject (see commentary on c. 34), it is stipulated that the following be taken into account: "lawful rights and customs and circumstances" and that the instructions be given "within the limits of universal and private law."

1277 Episcopus dioecesanus quod attinet ad actus administrationis ponendos, qui, attento statu oeconomico dioecesis, sunt maioris momenti, consilium a rebus oeconomicis et collegium consultorum audire debet; eiusdem tamen consilii atque etiam collegii consultorum consensu eget, praeterquam in casibus iure universali vel tabulis fundationis specialiter expressis, ad ponendos actus extraordinariae administrationis. Conferentiae autem Episcoporum est definire quinam actus habendi sint extraordinariae administrationis.

In carrying out acts of administration which, in the light of the financial situation of the diocese, are of major importance, the diocesan bishop must consult the finance committee and the college of consultors. However, in addition to the cases specifically expressed in the universal law or in the documents of foundation, for acts of extraordinary administration he needs the consent of the committee and of the college of consultors. It is for the bishops' conference to determine what are to be regarded as acts of extraordinary administration.

SOURCES: c. 1520 § 3; *AA* 10; *AG* 41; *PO* 17; *ES* I, 8

CROSS REFERENCES: cc. 127 § 2, 492–493, 502, 1281 § 3

COMMENTARY

Zoila Combalía

1. It is established that the diocesan bishop must hear or obtain the consent of two auxiliary bodies in the diocese before performing certain administrative acts. These acts are ordinary administrative acts of major importance and extraordinary administrative acts. The following are the distinguishing criteria:

a) For extraordinary administrative acts, it is bishops' conferences who have the determining power, probably in an attempt to favor unity of criteria within each country or region.

The norms issued in fulfillment of this remission are quite varied. Thus, some bishops' conferences use generic concepts to determine which are extraordinary administrative acts. For example, in Spain, apart from acts expressly declared to be extraordinary, also mentioned are acts that involve "substantial modification," "serious risk," and "considerable

alteration."[1] Other bishops' conferences, however, have opted to lay out a detailed and precise catalog of such acts. For example, in Argentina, the following are listed: "a) alienation or transfer of ownership by sale or donation; b) transfer of any faculty that is the equivalent of ownership; c) onerous or gratuitous transfer of real rights, such as easement, mortgage, emphyteusis; d) acquisition of new patrimonial goods; e) acquisition of productive goods; f) acceptance of legacies, lifetime assistance or deposits from third parties; g) extraordinary rental for reason of time or use, leasing and sharecropping; h) administration of the goods belonging to third parties; i) concession of life annuities; j) concession of bonds and mandates *ad omnia*; k) contracting loans for consumption or use; l) remodeling and demolition of buildings."[2]

b) With respect to acts that, not being extraordinary acts of administration, are of great importance, it was suggested in the Canon Law Revision Committee that there be a clearer determination of what was to be understood as such acts. The consultants deemed that the best statement would result by adding "attento statuto oeconomico dioecesis," a detail that was not included in the initial *schema*. Thus assessment of administrative acts of major importance is not absolute, but should be made in consideration of the financial situation of each diocese. It might happen "that some business of little consequence might become extremely important in a modest diocese or one with an unstable economic situation, owing to the degree of risk involved. It is the responsibility of the bishop to assess this importance and, where there is any doubt, request the advice of the bodies mentioned in this canon."[3] Aznar Gil describes such acts as those acts that "generally should belong to the normal and ordinary regimen of administration and, consequently, should fall within the usual powers of any administrator, since they are not removed from his competency by general Church law. Given the concrete social and economic situation of the diocese, however, such acts are considered to exceed the ordinary powers held by such administrators."[4]

2. The bodies that intervene in these acts are the finance committee (cf. cc. 492–493) and the college of consultors (cf. c. 502). Their intervention is regulated in the following terms: for ordinary administrative acts of great importance, the bishop must solicit the advice of both bodies; but for extraordinary administrative acts he needs not only advice, but also consent. Consent is also required when universal law so stipulates (cf., for example, c. 1292 §§ 1 and 2) or the document of foundation.

1. Cf. CBS, *Decreto*, December 1, 1984, a. 16, in *BOCEE* 6 (1985), pp. 63–65.
2. Norms complementary to the *CIC* issued by the CBS, September 16, 1986.
3. M. LÓPEZ ALARCÓN, commentary on c. 1277, in *Pamplona Com.*
4. F.R. AZNAR GIL, *La administración de los bienes temporales de la Iglesia* (Salamanca 1993), p. 383.

3. It is important to determine the juridical consequences of failing to follow these requirements. According the provisions of c. 127 § 2, administrative acts of great importance will be invalid if the ordinary has not heard the opinion of the financial committee and the college of consultors. Although it appears that there is no obligation to follow this advice—not even if it is unanimous—c. 127 provides that he "is not to act against their vote, especially if it is a unanimous one without a reason which, in the superior's judgment, is overriding." For extraordinary administrative acts, they shall be invalid if the ordinary does not ask for an opinion or also if, having asked it, acts against the opinion of the prescribed bodies.

4. When for the reasons given the administrative act is invalid, it may be inferred from c. 1281 § 3 that the juridical person is not held responsible "except and insofar as [the act] is to its benefit" (Related to this precept is the question of the civil relevance of failing to follow canon law; see commentary on c. 1281).

1278 **Praeter munera de quibus in can. 494, §§ 3 et 4, oeconomo committi possunt ab Episcopo dioecesano munera de quibus in cann. 1276, § 1 et 1279, § 2.**

Besides the duties mentioned in can. 494 §§ 3 and 4, the diocesan bishop may also entrust to the financial administrator the duties mentioned in cann. 1276 § 1 and 1279 § 2.

SOURCES: —
CROSS REFERENCES: cc. 494, 1276 § 1, 1279 § 2

COMMENTARY

Zoila Combalía

According to c. 494, the administration of diocesan goods falls to the financial administrator under the authority of the bishop. In addition to his ordinary administrative functions, the precept we are commenting on includes the possibility that the bishop may broaden his competence to include vigilance over administration of the goods belonging to public juridical persons subject to the diocesan bishop and also to administration of the ecclesiastical patrimony that has no administrator of its own.

In the process of drawing up the Code, some suggested that the following clause be added to c. 1278: "salva responsabilitate Episcopi de vigilantia recte agenda"; this, however, was considered superfluous considering that it is obviously the bishop's responsibility.

With respect to the financial administrator performing these functions, their nature is different in the two cases included in the Code. Thus, in the function indicated in c. 1279 § 2, the financial administrator does not carry out any duties that the law attributes directly to the bishop; he merely fills the lack of an immediate administrator. His competence will therefore theoretically be that of said administrator, and he will remain subject to the common regime of administrators of ecclesiastical goods unless the bishop, when assigning him the duty, limits his powers in some way. However, in the task of vigilance, it appears that the financial administrator acts more as a delegate of the bishop, for in that case he is filling a function that is incumbent upon him ex officio, as stipulated in c. 1276 § 1.

An author has criticized the excessive protagonism of the financial administrator; he is in favor of other controlling bodies such as there are in some Spanish dioceses.[1] In any case, whether it is appropriate to designate the financial administrator for the functions of c. 1278 remains up to the judgment of the diocesan bishop.

1. Cf. F. Aznar Gil, "La nueva organización económica de las diócesis españolas," in *El Derecho patrimonial canónico en España* (Salamanca 1985), p. 219.

1279 **§ 1. Administratio bonorum ecclesiasticorum ei competit, qui immediate regit personam ad quam eadem bona pertinent, nisi aliud ferant ius particulare, statuta aut legitima consuetudo, et salvo iure Ordinarii interveniendi in casu neglegentiae administratoris.**

§ 2. In administratione bonorum personae iuridicae publicae, quae ex iure vel tabulis fundationis aut propriis statutis suos non habeat administratores, Ordinarius, cui eadem subiecta est, personas idoneas ad triennium assumat; eaedem ab Ordinario iterum nominari possunt.

§ 1. The administration of ecclesiastical goods pertains to the one with direct power of governance over the person to whom the goods belong, unless particular law or statutes or legitimate custom state otherwise, and without prejudice to the right of the Ordinary to intervene where there is negligence on the part of the administrator.

§ 2. Where no administrators are appointed for a public juridical person by law or by the documents of foundation or by its own statutes, the Ordinary to which it is subject is to appoint suitable persons as administrators for a three-year term. The same persons can be re-appointed by the Ordinary.

SOURCES: § 1: c. 1182 § 2
§ 2: c. 1521 § 1

CROSS REFERENCES: cc. 28, 94, 1278

COMMENTARY

Zoila Combalía

Who is to perform the immediate administration of ecclesiastical goods is herein determined. Unless otherwise prescribed in particular law, statutes, or lawful custom, administration is attributed to the person who directly governs the public juridical person to whom the goods belong (for private juridical persons, cf. c. 1257 § 2). Any possible conflict of norms shall be resolved according to the general criteria established in the Code (cf. cc. 28, 94).

The Code itself frequently determines the administrator of public juridical persons. Thus, for example, in c. 532 it is determined for the parish.

In any case, to ensure that public juridical persons have an administrator § 2 indicates that, if there is no administrator, the ordinary shall appoint suitable persons for a three-year term. López Alarcón states that this is an appointed administrator, named in the absence of a legal, foundational or statutory tutor.[1]

Finally, the canon includes the ordinary's right to intervene where there is negligence by the administrator. The consultants had diverse opinions as to whether to include this clause,[2] but it is clear that, regardless of such an express reference in this place in the Code, it is the right and obligation of the ordinary, who is the mediate administrator, to ensure the diligent administration of the ecclesiastical goods of the public juridical persons under his authority.

1. M. LÓPEZ ALARCÓN, commentary on c. 1279, in *Pamplona Com.*
2. Cf. *Comm.* 12 (1980), p. 415.

1280 Quaevis persona iuridica suum habeat consilium a rebus oeconomicis vel saltem duos consiliarios, qui administratorem, ad normam statutorum, in munere adimplendo adiuvent.

Every juridical person is to have its own finance committee, or at least two counsellors, who are to assist in the performance of the administrator's duties, in accordance with the statutes.

SOURCES: —

CROSS REFERENCES: cc. 492–494, 537

COMMENTARY

Zoila Combalía

For the administration of ecclesiastical goods, the Code promotes the help of experts to ensure effective patrimonial management. Canon 1280 stipulates the obligation of each juridical person to have its financial council or at least two counsellors who will assess the administrator in the fulfillment of his duties.

This norm was not included in the 1977 *Schema*. During its revision, some consultant proposed establishing that any juridical person be required to have an administrative council. The proposal was accepted, but with the option, in case an administrative council might appear excessive, of naming at least two counsellors.[1]

The Code remits regulation to the statutes as to how to perform the task of assessment and certainly also the option between one or two counsellors.

As De Echeverría points out,[2] "the canon raises the question as to whether this council must be different from the actual governing body, that is, if in a foundation, for example, there will be both the patronage and a finance council with the resulting problem of division of authority. In some cases, as for the parishes, the Code seems to tend toward a distinction—cc. 536 and 537—but even there we explained our opinion favoring the possibility that it might be referring to a single body. This will be a question that will have to be decided by the appropriate authority—the

1. *Comm.* 12 (1980), pp. 415–416.
2. Cf. L. DE ECHEVERRÍA, commentary on c. 1280, in *Salamanca Com.*

ordinary or the bishops' conference, depending upon the case—that might choose the form of the two assessors or counsellors mentioned in this canon. The two together might be effective, although experience under the previous law of the two "tax deputies" in the seminaries was not, except rarely, exactly encouraging."[3]

Application of c. 1280 in the diocese is similar to the diocesan council of financial affairs, regulated in cc. 492 and 493.

3. Regarding the functioning of the Council of Financial Affairs in parishes, cf. F. AZNAR GIL, "La nueva organización económica de las diócesis españolas," in *El Derecho patrimonial canónico en España* (Salamanca 1985), pp. 214–217.

1281 **§ 1. Firmis statutorum praescriptis, administratores invalide ponunt actus qui fines modumque ordinariae administrationis excedunt, nisi prius ab Ordinario facultatem scripto datam obtinuerint.**

§ 2. In statutis definiantur actus qui finem et modum ordinariae administrationis excedunt; si vero de hac re sileant statuta, competit Episcopo dioecesano, audito consilio a rebus oeconomicis, huiusmodi actus pro personis sibi subiectis determinare.

§ 3. Nisi quando et quatenus in rem suam versum sit, persona iuridica non tenetur respondere de actibus ab administratoribus invalide positis; de actibus autem ab administratoribus illegitime sed valide positis respondebit ipsa persona iuridica, salva eius actione seu recursu adversus administratores qui damna eidem intulerint.

§ 1. Without prejudice to the provisions of the statutes, administrators act invalidly when they go beyond the limits and manner of ordinary administration, unless they have first received in writing from the Ordinary the faculty to do so.

§ 2. The statutes are to determine what acts go beyond the limits and manner of ordinary administration. If the statutes are silent on this point, it is for the diocesan bishop, after consulting the finance committee, to determine these acts for the persons subject to him.

§ 3. Except and insofar as it is to its benefit, a juridical person is not held responsible for the invalid actions of its administrators. The juridical person is, however, responsible when such actions are valid but unlawful, without prejudice to its right to bring an action or to have recourse against the administrators who have caused it damage.

SOURCES: § 1: c. 1527 § 1
§ 3: c. 1527 § 2

CROSS REFERENCES: cc. 128, 1277, 1291 ss, 1296, 1377, 1389, 1729

COMMENTARY

Zoila Combalía

1. Paragraph 1 establishes that to perform validly an extraordinary administrative act, the administrator needs the written authorization of the ordinary (keeping in mind that if it is a case where the act constitutes

alienation of goods, the guarantees stipulated in cc. 1291ff must also be followed). In the opinion of López Alarcón the absence of such authorization should be considered a remediable mistake.[1]

This prescription requires distinguishing between ordinary and extraordinary administrative acts, and the Code offers no clear criterion.[2] Although some in the committee for revising the Code suggested that the two kinds of acts be listed, the proposal was rejected due to its practical impossibility. It appears, however, that the Code followed a qualitative[3] criterion by indicating that an extraordinary administrative act is one that goes beyond the object and mode of fulfillment of an ordinary administrative act. This is the initial reference point (see c. 1284 and the final paragraph of its commentary, where it is shown how this canon may be illustrative in determining "the object and mode of fulfillment of ordinary administration"). López Alarcón gives some reference points that could be taken into account for such a valuation. He mentions, for example, "the amount by which the patrimony is diminished; the risk of serious losses; how the capital or only the income is affected; danger to the stability of the basic patrimony; the nature of the thing that is the object of the administrative act and the service it renders; the type and complexity of the action; the value of the object; the duration of the terms for execution that might be established; the uncertainty of the financial results, etc."[4]

2. Paragraph 2 remits the determination of which administrative acts are to be considered as extraordinary to the statutes of the juridical person. In the absence of statutory prescription, it is the responsibility of the diocesan bishop, after consulting the financial affairs council.

There is no contradiction between this attribution and the attribution in c. 1277 to the bishops' conferences. Whereas c. 1277 refers to the diocese, c. 1281 considers other juridical persons with statutes which determine the acts to be considered as extraordinary administrative acts. Usually the criteria given by the bishops' conference to the diocese of each country or, absent that, the regulation that the diocesan bishop will make will be the basis of said statutory regulation. However, as De Echeverría notes, it may happen that what "is ordinary administration for the diocese as a whole may be extraordinary for persons of inferior rank, under the bishop's authority. The bishop may, therefore, not make use of the norm given by the bishops' conference, but may apply it only to the acts of the diocese itself, giving his own criteria for subordinate entities."[5]

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1. M. LÓPEZ ALARCÓN, commentary on c. 1281, in *Pamplona Com.*
2. A reference to distinct doctrinal criteria for the delimitation of administrative acts pertaining to one or the other type can be found in F.R. AZNAR GIL, *La administración de los bienes temporales de la Iglesia* (Salamanca 1993), pp. 379ff.
3. Cf. J.L. SANTOS, "La administración extraordinaria de los bienes eclesiásticos," in *Derecho patrimonial canónico en España* (Salamanca 1985), p. 44.
4. M. LÓPEZ ALARCÓN, commentary on c. 1281, cit.
5. L. DE ECHEVERRÍA, commentary on c. 1281, in *Salamanca Com.*

3. Finally § 3 concerns the responsibility of the juridical person for invalid and illegal acts of the administrator. It establishes the following guidelines: whereas the juridical person is not responsible for invalid acts performed unless and insofar as they were to its financial advantage, it is, however, responsible for the illegal but valid acts of its administrators, saving its right to bring action or have recourse against the administrators to repair any damage.

With regard to the administrator's responsibility in these situations, it is possible that it could even be subject to penalty and be the type of offense described in c. 1377 for alienation of ecclesiastical goods without the prescribed permission, or the more generic kind described in c. 1389 as abuse of power. If the commission of such offenses leads to damage to third parties, the injured party may in the same penal case take contentious action to repair the damages as stipulated in c. 1729. The right to such a remedy would also exist even if there were no penal responsibility of the administrator, by virtue of c. 128, "whoever unlawfully causes harm to another by a juridical act, or indeed by any other act which is malicious or culpable, is obliged to repair the damage done."

4. In these matters it is necessary to raise the question of the impact of secular law and the opportunity of having recourse to one or the other jurisdiction.

As for the possible connections between civil and canon law, it does not seem very likely that a transaction invalid under civil law would be valid under canon law. This is because "whatever the local civil law decrees about contracts ... and about the voiding of contracts, is to be observed regarding matters which are subject to the power of governance of the Church, and with the same effect, provided that the civil law is not contrary to divine law, and that canon law does not provide otherwise" (c. 1290).

It could, however, happen that a canonically invalid transaction would be valid under civil law for the reason that the canonical norms pertaining to this are not found in civil law. In that case it seems that the criteria prescribed in c. 1296 should be followed for the specific case of alienation in order to determine jurisdiction and the action to bring. A prudent measure to take, pointed out by López Alarcón, and one that might be useful where civil legislation does not include the canonical norms, would be to insert into contracts a cancellation clause or a condition that the transaction is invalid under civil law if it is not valid under the canonical system.[6]

Finally, if the transaction falls under both secular and canon law, the opportunity to choose jurisdiction will be decided by the competent authority in each case. I believe that the juridical nature of the litigating

6. Cf. M. LÓPEZ ALARCÓN, commentary on c. 1281, cit.

parties will influence the decision. Although the fact that the canonical decision cannot be carried out with civil effect might incline us toward civil jurisdiction (if the two parties are public ecclesiastical persons, for example), it might be more suitable and effective to follow canonical jurisdiction and obviate the civil.

1282 **Omnes, sive clerici sive laici, qui legitimo titulo partes habent in administratione bonorum ecclesiasticorum, munera sua adimplere tenentur nomine Ecclesiae, ad normam iuris.**

All persons, whether clerics or laity, who lawfully take part in the administration of ecclesiastical goods, are bound to fulfil their duties in the name of the Church, in accordance with the law.

SOURCES: c. 1521 § 2; *PO* 17

CROSS REFERENCES: cc. 116, 1257

COMMENTARY

Zoila Combalía

The special duty of fidelity is stipulated for the administrator of ecclesiastical goods. It does not derive from the fact that he is not a private administrator, but rather because he is acting in the name of the Church and is therefore strictly observing the law.

The specification "clerics or laity" is possibly due to a desire to make it clear that the obligation is imposed upon all, as opposed to c. 1521 § 2 of *CIC*/1917, that named only the laity.

This canon refers to the administration of ecclesiastical goods that, under c. 1257, are goods belonging to public juridical persons. It is therefore logical that the administration of their goods be performed in the name of the Church, since that is what distinguishes public juridical persons from private juridical persons. Both see to the common good of the Church, but they differ in their manner of achieving it: "public juridical persons, acting in the name of the Church and therefore involving it to a certain degree as a social institution; private juridical persons, acting in their own name and under the exclusive responsibility of their members."[1]

1. E. MOLANO, commentary on c. 116, in *Pamplona Com.*

1283 **Antequam administratores suum munus ineant:**
1° debent se bene et fideliter administraturos coram Ordinario vel eius delegato iureiurando spondere;
2° accuratum ac distinctum inventarium, ab ipsis subscribendum, rerum immobilium, rerum mobilium sive pretiosarum sive utcumque ad bona culturalia pertinentium aliarumve cum descriptione atque aestimatione earundem redigatur, redactumque recognoscatur;
3° huius inventarii alterum exemplar conservetur in tabulario administrationis, alterum in archivo curiae; et in utroque quaelibet immutatio adnotetur, quam patrimonium subire contingat.

Before administrators undertake their duties:
1° they must take an oath, in the presence of the Ordinary or his delegate, that they will well and truly perform their office;
2° they are to draw up a clear and accurate inventory, to be signed by themselves, of any immovable goods, of those movable goods which are precious or in any way of cultural value, and of any other goods, with a description and an estimate of their value; and they are to review any inventory already drawn up;
3° one copy of this inventory is to be kept in the administration office and another in the curial archive; any change which takes place in the property is to be noted on both copies.

SOURCES: c. 1522

CROSS REFERENCES: cc. 1283 § 2, 1292 § 2

COMMENTARY

Zoila Combalía

The administrator's obligations before undertaking the duties of office are the subject of this canon. The oath and the inventory are mentioned with few differences compared to the previous regulation (cf. c. 1522 *CIC*/1917).

a) The solemn promise in the oath sworn before the ordinary to perform the office well and faithfully raises no special issues. Although during the process of drawing up the Code it was proposed not to require the oath, but only a promise, this suggestion was not accepted.[1]

1. Cf. *Comm.* 12 (1980), p. 418.

b) With respect to preparing an inventory, "this is a measure of basic prudence for the conservation of the ecclesiastical patrimony. If taken seriously, it may serve to ensure that the patrimony of the juridical person will be preserved, to control the management of the previous administrator and the security of the new one."[2] To comply with canon law the inventory must be accurate and detailed.

2. With regard to the contents of the inventory, the following are specified: immovable goods, movable goods that are precious or that belong to the cultural patrimony, and any other goods. In adding "any other goods" it is made clear that the inventory should be exhaustive, although particular care is to be taken with regard to the goods indicated. The express reference to those goods goes together with other special provisions in the Code that include them and that are applied along with the general patrimonial administrative regimen.

3. With regard to determining which are precious and which are cultural goods, Martín de Agar[3] says correctly that preciousness in goods cannot be determined merely by virtue of their material or money value; all the other reasons for which concrete goods may be appreciated in the Church must also be taken into account; allusions to popular worship and veneration and the practical consideration of ex-votos donated to the Church (cf. c. 1292 § 2) denote a sensitivity in the lawmakers that obviously exceeds mere financial criteria.

One reason for appreciating ecclesiastical goods is their cultural value, as expressly stated in c. 1292 § 2, that refers to goods that are precious for "artistic or historical reasons." It therefore appears that cultural goods are extendable to precious goods (cf. cc. 638 § 3, 1189, 1220 § 2, 1270, 1292 § 2, among others), although c. 1283 § 2 distinguishes between the two types. The same is true of the wording of *CIC*/1917, that mentions only precious goods, including cultural goods in them.

The Code prescribes that a description and estimate of the value of the goods shall be attached to the inventory list and that the administrators sign the inventory. As López Alarcón states, some of the goods—due to their cultural value, etc.—will be difficult to evaluate, in which case a description is sufficient.[4]

4. There was a clause in the previous Code that covered the possibility of accepting the inventory "previously drawn up and noting on it the items that in the interim had disappeared or had been acquired." That clause has disappeared.

2. F.R. AZNAR GIL, *La administración de los bienes temporales de la Iglesia* (Salamanca 1993), p. 364.
3. J.T. MARTÍN DE AGAR, "Bienes temporales y misión de la Iglesia," in *Manual de Derecho Canónico*, 2nd ed. (Pamplona 1991), p. 711.
4. M. LÓPEZ ALARCÓN, commentary on c. 1283, in *Pamplona Com.*

5. After the inventory has been made, this canon prescribes that it is to be reviewed. One copy will be kept in the administration files and the other in the curial files; any change in the patrimony is to be noted thereon.

6. It is important to remember that ecclesiastical goods of historic, artistic, and documentary value are of interest to both the Church and the State, and therefore it is likely that there will be agreements made on the norms covering them. For example, art. XV of the Agreement about Cultural Affairs between the Holy See and the Spanish State prescribes mutual cooperation for their preservation and conservation, and a joint committee to be established for that purpose. The committee approved a series of basic criteria on October 30, 1980, among which is the following: "The first stage of technical and financial cooperation shall consist of drawing up an inventory of all historic, artistic and documentary goods, movable or immovable, as well as a list of archives and libraries of historical, artistic or bibliographical interest that belong to ecclesiastical entities under any title whatsoever." On 30 March 1982 the norms to govern the inventory were agreed upon.[5]

5. Both those norms as well as the basic criteria approved by the Comisión mixta Iglesia-Estado were not officially published. They can be consulted in A. MOLINA and M.E. OLMOS, *Legislación eclesiástica* (Madrid 1992).

1284 **§ 1. Omnes administratores diligentia boni patrisfamilias suum munus implere tenentur.**

§ 2. Exinde debent:

1° vigilare ne bona suae curae concredita quoquo modo pereant aut detrimentum capiant, initis in hunc finem, quatenus opus sit, contractibus assecurationis;

2° curare ut proprietas bonorum ecclesiasticorum modis civiliter validis in tuto ponatur;

3° praescripta servare iuris tam canonici quam civilis, aut quae a fundatore vel donatore vel legitima auctoritate imposita sint, ac praesertim cavere ne ex legum civilium inobservantia damnum Ecclesiae obveniat;

4° reditus bonorum ac proventus accurate et iusto tempore exigere exactosque tuto servare et secundum fundatoris mentem aut legitimas normas impendere;

5° foenus vel mutui vel hypothecae causa solvendum, statuto tempore solvere, ipsamque debiti summam capitalem opportune reddendam curare;

6° pecuniam, quae de expensis supersit et utiliter collocari possit, de consensu Ordinarii in fines personae iuridicae occupare;

7° accepti et expensi libros bene ordinatos habere;

8° rationem administrationis singulis exeuntibus annis componere;

9° documenta et instrumenta, quibus Ecclesiae aut instituti iura in bona nituntur, rite ordinare et in archivo convenienti et apto custodire; authentica vero eorum exemplaria, ubi commode fieri potest, in archivo curiae deponere.

§ 3. Provisiones accepti et expensi, ut ab administratoribus quotannis componantur, enixe commendatur; iuri autem particulari relinquitur eas praecipere et pressius determinare modos quibus exhibendae sint.

§ 1. All administrators are to perform their duties with the diligence of a good householder.

§ 2. Therefore they must:

1° be vigilant that no goods placed in their care in any way perish or suffer damage; to this end they are, to the extent necessary, to arrange insurance contracts;

2° ensure that the ownership of ecclesiastical goods is safeguarded in ways which are valid in civil law;

3° observe the provisions of canon and civil law, and the stipulations of the founder or donor or lawful authority; they are to take special care that damage will not be suffered by the Church through the non-observance of the civil law;
4° seek accurately and at the proper time the income and produce of the goods, guard them securely and expend them in accordance with the wishes of the founder or lawful norms;
5° at the proper time pay the interest which is due by reason of a loan or mortgage, and take care that in due time the capital is repaid;
6° with the consent of the Ordinary, make use, for the purposes of the juridical person, of money which is surplus after payment of expenses and which can be profitably invested;
7° keep accurate records of income and expenditure;
8° draw up an account of their administration at the end of each year;
9° keep in order and preserve in a fitting and secure archive the documents and records establishing the rights of the Church or institute to its goods; where conveniently possible, place authentic copies in the archive of the curia.

§ 3. It is earnestly recommended that administrators draw up each year a budget of income and expenditure. However, it is left to particular law to make this an obligation and to determine more precisely how it is to be presented.

SOURCES: c. 1523

CROSS REFERENCES: c. 1257 § 1

COMMENTARY

Zoila Combalía

After the previous canon referred to the administrator's obligations prior to performing his duties, this one considers his obligations during the performance of his office.

Paragraph 1 establishes the general principle upon which that performance should be based: the diligence of a good householder. This is a traditional criterion that normally guides civil law and that was also used in *CIC*/1917.

Paragraph 2 details the administrator's obligations in wording similar to that of c. 1523 of *CIC*/1917. It does, however, include some details that tend to ensure to a greater degree of safety for the ecclesiastical

patrimony. Among the items added are taking out insurance policies, if necessary, diligence in paying interest and returning borrowed capital, and, especially, emphasis on observing civil law. The need to do so is clearer today considering the principles that govern Church and State relations. The principles tend to recognize civil effectiveness for the norms of canon law that are within the State system, but are not marginal or contrary to it,[1] and to consider the damage that may affect the ecclesiastical patrimony as a result of failure to follow civil norms: fines, loss of goods, etc.

Paragraph 3 recommends that an annual budget be drawn up and leaves regulation and general guidelines to private law. Thus, preparation of the budget as provided in c. 493 for a diocese is extended to all public juridical persons. The Code does not require a budget, although "it is earnestly recommended" that one be drawn up; good administration starts with the careful preparation of a balanced budget.[2]

By giving a general description of the obligations and duties of the administrator, this canon may serve as a guideline to determine the scope of "the purposes and methods of ordinary administration" and, therefore, to clarify what must be understood by extraordinary administrative acts (see commentary on c. 1281).

1. J.T. MARTÍN DE AGAR, "Bienes temporales y misión de la Iglesia," in *Manual de Derecho Canónico*, 2nd ed. (Pamplona 1991), p. 729.

2. Cf. M. LÓPEZ ALARCÓN, commentary on c. 1284, in *Pamplona Com.*

1285 **Intra limites dumtaxat ordinariae administrationis fas est administratoribus de bonis mobilibus, quae ad patrimonium stabile non pertinent, donationes ad fines pietatis aut christianae caritatis facere.**

Solely within the limits of ordinary administration, administrators are allowed to make gifts for pious purposes or christian charity out of the movable goods which do not form part of the stable patrimony.

SOURCES: c. 1535

CROSS REFERENCES: cc. 1254 § 2, 1281

COMMENTARY

Zoila Combalía

Donations made by administrators for pious or Christian charitable purposes are regulated here. This precept is related to c. 1254 § 2, wherein among the Church's proper purposes for which temporal goods are intended, "works of the sacred apostolate and charity, especially for the needy" are mentioned.

However, the following limitations are established for fulfilling these purposes with donations given by administrators: they must be ordinary administrative acts (see commentary on c. 1281), the donations must come from movable goods, and they must not belong to the stable patrimony of the juridical person.

López Alarcón describes the concept of stable patrimony as "the goods that constitute the minimum and certain financial base upon which the juridical person can subsist independently and meet its proper purposes and needs; but there are no absolute rules establishing the idea of patrimonial stability, for it is a function of the nature and amount of goods, the financial requirements to achieve the purposes, and the stationary or expanding position of the entity as it performs its mission."[1] During the codification process, the suitability of using the expression "stable patrimony" was discussed in the belief that it was not adequate for the movement and flow of actual finances, but it was finally accepted.[2]

1. M. LÓPEZ ALARCÓN, commentary on c. 1284, in *Pamplona Com.*
2. Cf. *Comm.* 12 (1980), p. 420.

Although the established limitations are not penalized with nullity of the act but with illicitness, nevertheless, under the prescriptions of cc. 1281, 291ff, it appears unlikely that the administrator could validly make a donation exceeding the scope stipulated in this canon (see commentary on c. 1281).

1286 **Administratores bonorum:**

1° in operarum locatione leges etiam civiles, quae ad laborem et vitam socialem attinent, adamussim servent, iuxta principia ab Ecclesia tradita;

2° iis, qui operam ex condicto praestant, iustam et honestam mercedem tribuant, ita ut iidem suis et suorum necessitatibus convenienter providere valeant.

Administrators of temporal goods:

1° in making contracts of employment, are accurately to observe also, according to the principles taught by the Church, the civil laws relating to labour and social life;

2° are to pay to those who work for them under contract a just and honest wage which would fittingly provide for their needs and those of their dependents.

SOURCES: c. 1524; PIUS PP. XI, Enc. *Quadragesimo anno* (*AAS* 23 [1931] 200–201); PIUS PP. XI, Enc. *Divini Redemptoris* (*AAS* 29 [1937] 92); PIUS PP. XII, Radiomessaggio per Natale 1942 (*AAS* 35 [1943] 20); PIUS PP. XII, Discorso, 13 iun. 1943 (*AAS* 35 [1943] 172); IOANNES PP. XXIII, Enc. *Mater et Magistra* (*AAS* 53 [1961] 419); *AA* 22; *GS* 67

CROSS REFERENCES: c. 1257 §1

COMMENTARY

Zoila Combalía

The administrators' obligations to observe civil laws in labor and social matters and to pay a fair and honest wage are established herein.

The passive subjects of these obligations are the Church's *employees*. These are persons who provide professional services that are not directly linked to the Church's spiritual purpose. These persons are governed by the norms of civil law, and the rights they derive from their professional relationship (basically, the right to be remunerated) are exercised under that law. They are therefore the rights of a citizen, not of the faithful.

These employees must be distinguished from the faithful layperson (referred to in c. 231) dedicated to *special Church services*, that is, directly linked to the ecclesiastical spiritual purpose, such as missionary

and catechetical activities, performing certain ecclesiastical offices or duties, etc. For these, the professional relationship develops juridically within the scope of canon law, although in some cases the canonical relationship may be formalized in secular terms, provided that it does not lead to a loss of the ecclesial sense of dedication.[1]

Regarding the professional link, normally the law of the State accepts, together with the labor contract, the method of a civil contract for leasing services. Because that is so, Otaduy has appropriately criticized the official Spanish translation of c. 1286, which establishes an equivalence between the broad form of *locatio operarum* and the specific institution of the labor contract proper to labor law. He points out that other versions of c. 1286 are more nuanced than the Spanish, which omits express reference to the labor contract. The French translation speaks of *l'engagement du personal employé* and the Italian translation refers to the observance of secular laws *nell'affidare i lavori.*[2]

It must not be forgotten that the *right to a just and honest wage* is one of the natural rights of a person. The usual practice in current civil law is to recognize and in effect protect it. If there were a case where the State does not sufficiently guarantee it, that is no reason for the *canonical employer* to fail to comply with this natural obligation towards his employees, under—or in this case, not under—civil law. The Church must be very careful to protect the rights of the personnel it contracts. Its conduct must serve as a stimulus to and support for its constant predication on this point, reminding secular society that, in the words of John Paul II, "society and the State must ensure wage levels adequate for the maintenance of the worker and his family, including a certain amount for savings" (*CAn* 15).

Compliance with civil law, frequently referenced in this title, here acquires singular importance, for it not only protects ecclesiastical goods but also answers the need for justice toward workers, who must not be deprived of the protection that those laws normally grant.

Because of this strong protection of workers and their rights, etc., that is frequently embodied in the labor legislation of different countries and that also inspires the Church's social doctrine,[3] conformity to the

1. J. DE OTADUY, "El derecho a la retribución de los laicos al servicio de la Iglesia," in *Fidelium Iura* 2 (1992), pp. 187–206.

2. Ibid., pp. 200–201.

3. Making no pretense of an exhaustive list, we here give a few references to documents issued by the popes which reflect the concern of the Church about social questions. In this sense, the Encyclicals *Rerum Novarum*, LEO XIII (May 15, 1891); *Quadragesimo Anno*, PIUS XI (May 15, 1931); *Mater et Magistra*, JOHN XXIII (May 15, 1961); *Populorum Progressio* (March 26, 1967), PAUL VI; *Laborem Exercens* (September 14, 1981), *Sollicitudo Rei Socialis* (December 30, 1987) and *Centesimus Annus* (May 1, 1991) JOHN PAUL II.

principles the Church teaches with regard to observing civil labor laws, as prescribed in this canon, will generally be in the form of compliance. Sometimes conformity to the Church's doctrine could lead to the failure to apply certain civil law dispositions if there is a discrepancy between them. This happens in the case, cited by some writers, of secular labor legislation that insures its workers for abortion costs, etc.[4]

4. Cf. J. MYERS, "The Temporal Goods of the Church," in J.A. CORIDEN-T.J. GREEN-D.E. HEINTSCHEL (Eds.), *The Code of Canon Law. A Text and Commentary* (New York 1985), p. 877.

1287 **§ 1. Reprobata contraria consuetudine, administratores tam clerici quam laici quorumvis bonorum ecclesiasticorum, quae ab Episcopi dioecesani potestate regiminis non sint legitime subducta, singulis annis officio tenentur rationes Ordinario loci exhibendi, qui eas consilio a rebus oeconomicis examinandas committat.**

§ 2. De bonis, quae a fidelibus Ecclesiae offeruntur, administratores rationes fidelibus reddant iuxta normas iure particulari statuendas.

§ 1. Where ecclesiastical goods of any kind are not lawfully withdrawn from the power of governance of the diocesan bishop, their administrators, both clerical and laity, are bound to submit each year to the local Ordinary an account of their administration, which he is to pass on to his finance committee for examination. Any contrary custom is reprobated.

§ 2. Administrators are to render accounts to the faithful concerning the goods which the faithful have given to the Church, in accordance with the norms to be laid down by particular law.

SOURCES: § 1: c. 1525 § 1; SCRSI Decl., 30 sep. 1972
§ 2: c. 1525 § 2

CROSS REFERENCES: cc. 24 § 2, 591, 1257 § 1, 1276, 1284 § 2,8°

COMMENTARY

Zoila Combalía

1. Among the administrators' obligations c. 1284 § 2, 8° includes "drawing up an account of their administration at the end of each year." Now the authority is specified to whom accounts must be rendered as a means of vigilance and control over the administration of ecclesiastical goods by the ordinary (see c. 1276).

The obligation includes all administrators of ecclesiastical goods, clergy and laypersons, provided that the juridical person to whom the goods belong is not exempt from the power of governance of the diocesan bishop (see c. 591). In that case, accounts must be rendered to the ecclesiastical authority to which the juridical person is subject.

The frequency established by the Code for rendering accounts is annual and, as prescribed in the canon, the local ordinary authorizes the finance committee to review the accounts. Any custom contrary to these provisions is reprobated (see c. 24 § 2).

For certain public juridical persons special norms are established in other parts of the *CIC*. Thus, public associations of the faithful shall render accounts of their administration to the authority that erected them: the Holy See, the bishops' conference, or the diocesan bishop (cc. 312 and 319). For institutes of consecrated life, their provinces and houses, c. 636 provides that both the financial administrator and others who have financial responsibility shall give an account to the competent authority at the time and in the manner determined by their statutes; monasteries *sui iuris* are to present their accounts to the local ordinary (c. 637) and parish administrators to the parish priest (c. 540).

2. Paragraph 2 prescribes the obligation to render accounts to the faithful for the goods they have donated to the Church. Although the term "render accounts" is used, this is obviously not a rendering of accounts as prescribed in the previous paragraph, but is intended, as we have explained, to provide for the legitimate control and vigilance of the authority over the administration of ecclesiastical goods. "It appears," affirms López Alarcón, "that this entails presenting information about the state and use of these goods rather than a formal rendering of accounts."[1]

1. M. LÓPEZ ALARCÓN, commentary on c. 1287, in *Pamplona Com.* Cf. a different opinion in F.R. AZNAR GIL, *La administración de los bienes temporales de la Iglesia* (Salamanca 1993), p. 390.

1288 Administratores litem nomine personae iuridicae publicae ne inchoent neve contestentur in foro civili, nisi licentiam scripto datam Ordinarii proprii obtinuerint.

Administrators may not, in the name of a public juridical person, either institute or contest legal proceedings in a civil court without first having obtained the written permission of their proper Ordinary.

SOURCES: c. 1526

CROSS REFERENCES: cc. 128, 1281 § 3

COMMENTARY

Zoila Combalía

To institute or contest legal proceedings in the name of a public juridical person, administrators must obtain written permission from their local ordinary.

It would perhaps be helpful to explain that the term "legal proceedings" refers to "any contentious legal action which might affect the patrimony of a public juridical person, whether adversely or favorably. Administrative proceedings are not considered contentious, nor are acts of voluntary jurisdiction, but criminal suits are not excluded since the subsequent civil responsibility might eventually fall upon these patrimonies."[1]

The purpose of requiring permission lies in the risk that a law suit may involve ecclesiastical goods, and also for reasons of prudence, among which De Echeverría mentions "the impact that claiming rights in a civil court might have on public opinion."[2] All of this shows how important it is that the authority be informed enough to act more opportunely and to adopt precise guarantees.

With regard to the object of permission, this canon refers only to legal proceedings in civil courts, as opposed to c. 1526 of *CIC*/1917. For canon law proceedings, c. 1480 provides for judicial proceedings by juridical persons through their representatives, and does not mention the need for permission.

If the administrator should act without the prescribed permission, the act shall not be invalid but shall be illicit; therefore, if there is resultant harm to the ecclesiastical patrimony, the administrator would be bound to repair it under c. 128 (cf. also c. 1281 § 3).

1. M. LÓPEZ ALARCÓN, commentary on c. 1288, in *Pamplona Com.*
2. L. DE ECHEVERRÍA, commentary on c. 1288, in *Salamanca Com.*

1289 **Quamvis ad administrationem non teneantur titulo officii ecclesiastici, administratores munus susceptum arbitratu suo dimittere nequeunt; quod si ex arbitraria dimissione damnum Ecclesiae obveniat, ad restitutionem tenentur.**

Although they may not be bound to the work of administration by virtue of an ecclesiastical office, administrators may not arbitrarily relinquish the work they have undertaken. If they do so, and this occasions damage to the Church, they are bound to restitution.

SOURCES: c. 1528

CROSS REFERENCES: cc. 128, 1279 § 2

COMMENTARY

Zoila Combalía

It is established that administrators may not arbitrarily relinquish their duties. This provision refers to administrators in general and to administrators not bound by virtue of an office such as, for example, administrators named by the ordinary under c. 1279 § 2.

The legitimate ways an administrator concludes his functions will be similar to those provided in the Code for loss of office even if he is not an administrator by virtue of an office (cf. c. 184). Possibilities among these are voluntary relinquishment, relinquishment based on a just and given cause (cf. cc. 187ff), but never arbitrary relinquishment.

The reason for the prohibition lies in the harm that may be caused to the ecclesiastical patrimony in the case of arbitrary relinquishment; if harm did occur, it would generate an obligation to restitution. This precept is expressly established as a consequence of the general provision in c. 128.

TITULUS III
De contractibus ac praesertim de alienatione

TITLE III
Contracts and Especially Alienation

INTRODUCTION

Joaquín Mantecón

1. Although this title begins with the generic term "On contracts ...," most of the canons refer exclusively to alienation (cc. 1291–1294, 1296 and 1298). In addition, c. 1295 establishes that, for the purposes of applying canon law on alienation, any act or transaction by which the patrimonial situation of a public juridical person may be harmed is equivalent thereto. Only one canon (c. 1297) refers to a different type of contract, namely leases.

Therefore, this title principally contains the regulation applicable to all acts by which public juridical persons may alienate their goods. The placement and content of this title is logical, since it follows an explanation of the meaning of temporal goods and the need of the Church for them, as well as the norms regulating their acquisition (tit. I) and administration (tit. II).

The treatment of this matter in the *CIC* differs markedly from its treatment in *CIC*/1917. Under the title "De contractibus" (cc. 1529–1543), in addition to alienation, *CIC*/1917 is concerned in detail with contracts such as donations, loans, mortgages, exchanges, leasing, and enfiteusis.

2. The canon that opens the title, c. 1290, refers generically to contracts without mentioning any particular type. Following in the steps of *CIC*/1917 (see c. 1529) on the subject of contracts and payments, the *CIC* broadly canonizes civil laws, with only two exceptions. First, if the norms are contrary to divine law, they have no value in canon law. Second, if there is a specific prescription in canon law, canon law prevails over the civil law governing that matter. This is a concrete application of the criteria on the canonization of civil laws found in c. 22.

So, the Church has in principle renounced drawing up its own norms on the matter. It does so not for lack of power, but for merely opportune criteria. If the Church has an innate right to own temporal goods to

achieve its own purposes, it also has the right to prescribe the organization and administration of the goods (cc. 1254–1255). Waiving the right to establish such norms can be explained by the tendency in civil law not to concede juridical relevance to canon law, except by agreement or concordat, and almost always with restrictive criteria. But, it is also a fact that the Church has generally not made laws to regulate transactions of a more directly temporal nature. In addition, any attempt to establish canon law in this matter would constitute a permanent source of disagreement between the two legal systems. It would cause problems for the Church itself, which would be unable to assert its rights in civil jurisdiction. With the canonization of civil law, on the other hand, contracts drawn up under canon law have the same effect as under civil law.

Canonization of civil law on contracts is not necessarily limited to contracts on ecclesiastical goods. It is extended to all contracts—and to the extinction of obligations, including extracontractual ones—concerned with matters subject to the Church's power of governance, as has been stated in jurisprudence upon occasion and as Lombardía has pointed out (see commentary on c. 1290). For possible problems of interpretation that canonized norms may cause, the principles of civil law of which the norm is a part must be consulted.

3. Following the criteria of decentralization and subsidiarity[1] typical of this Code, there are two remissions to decisions of the bishops' conferences (see cc. 1292 §1 and 1297).

4. In the matter of alienation of ecclesiastical goods, canon law establishes a series of requirements for the act to be legal and valid. The purpose of these requirements is to ensure the need for alienation, to ensure that the necessary patrimonial basis of public juridical persons—the only ones whose goods are considered to be ecclesiastical goods (c. 1257 §1)—is not lost or diminished, thus preventing the achievement of their institutional purposes.

Therefore, following a well-distilled tradition, in some cases authorization or permission of the competent authority is required for the alienation to be valid (cc. 1291, 1292 §§2 and 4). But, not every act of alienation is subject to the requirement of prior permission. Canon 1291 provides that permission is required only if the goods to be alienated are part of the juridical person's stable patrimony and their value exceeds an amount to be established by the proper bishops' conference. Canon 1292 establishes the criteria to determine which authority must grant permission. These criteria refer to the estimated value of the goods to be alienated.

If the value is under the minimum amount set by the bishops' conference, alienation is not subject to special procedures or to obtaining permission. If the value falls between the minimum and the maximum, and

1. Cf. *Principles*, 5.

the juridical person is diocesan or subject to the bishop, it is the bishop—with the consent of the financial committee, the college of consultors, and the interested parties—who is to grant permission. If the person is not diocesan, its statutes determine the authority that is to grant permission.

If the value of the goods exceeds the maximum, or if the goods have a special value (religious—such as ex-votos—or historical or artistic), permission of the Holy See is required. Alienation of goods belonging to religious institutes is governed by their own norms, similar to the ones in c. 638 §§3 and 4.

5. The *CIC* also establishes a series of requisites that are required only for the legality of the act of alienation, to ensure the timeliness of the act and the patrimonial stability of the interested person. These requisites include requirements for a just cause that provides a reason for the alienation to be transacted (c. 1293 §1); prior valuation of the goods to be alienated (c. 1293 §2); the following of any precautions the lawful authority considers necessary to ensure that the operation is not to the detriment of a juridical person's patrimony (c. 1293 §3); and, finally, the goods ordinarily must not be alienated for a price under the valuation (c. 1294 §1), although there are exceptions.

6. Canon 1295 establishes that the statutes of public juridical persons must follow all these requirements, which apply not only to alienation but also to all transactions that might harm the juridical person's patrimony. Therefore, whenever the *CIC* refers to alienation, the term must be interpreted in the broad sense.

7. The *CIC* also covers the possibility that alienation or an equivalent act might be carried out in accordance with civil law, while omitting some of the requirements imposed by canon law for validity. In those cases, c. 1296 places the decision to be made in the hands of the competent ecclesiastical authority, so as to vindicate the Church's rights, following prudent criteria. This means considering possible juridical actions to repair the damages caused, without occasioning any further deterioration in the patrimonial situation of the juridical person affected.

8. Canon 1297 concerns the leasing of the Church's goods. Although *CIC*/1917 offered a complex set of norms, the *CIC* has opted not to regulate the matter directly, but remits it to the bishops' conferences, whose duty it is to determine all the details pertaining to the permission to be obtained from the competent ecclesiastical authority.

9. Finally, a classic norm is reproduced, prohibiting the alienation or leasing of ecclesiastical goods to the administrators or their relatives to the fourth degree of consanguinity or affinity, without special written permission from the competent authority (c. 1298). This permission is required only to make the act legal.

1290 Quae ius civile in territorio statuit de contractibus tam in genere, quam in specie et de solutionibus, eadem iure canonico quoad res potestati regiminis Ecclesiae subiectas iisdem cum effectibus serventur, nisi iuri divino contraria sint aut aliud iure canonico caveatur, et firmo iure canonico caveatur, et firmo praescripto can. 1547.

Without prejudice to can. 1547, whatever the local civil law decrees about contracts, both generally and specifically, and about the voiding of contracts, is to be observed regarding matters which are subject to the power of governance of the Church, and with the same effect, provided that the civil law is not contrary to divine law, and that canon law does not provide otherwise.

SOURCES: c. 1529
CROSS REFERENCES: cc. 22, 1547

COMMENTARY

Joaquín Mantecón

1. Following the criterion established by *CIC*/1917 in c. 1529 on this matter, the *CIC* canonizes the corresponding local civil laws on contracts and payments. And it does so broadly, for it accepts civil laws on this point "tam in genere quam in specie." This is a typical "remission norm," according to the terminology of international private law.

For this canonization, the applicable civil norms begin to operate in the canonical area for those matters mentioned in the canon and subject to the Church's power of governance, with the same force and effect as if they were properly canonical. It is appropriate that the canonical legislator did not declare that civil law is supplementary to canon law, but that the canonical norms ordinarily applicable to the case are civil norms. These then are norms that, although they are certainly civil, they are formally canonical, since the canonical legislator is the only one with the power to give them obligatory force within the scope of canon law. The applicable civil norm shall be the one *pro tempore existens* in each country.

2. As for the interpretation of the norms that have been canonized, it is necessary to consult the criteria established by the civil law system to which said laws belong, but c. 1290 itself will have to be interpreted according to the canonical criteria in c. 17.[1]

1. Cf. O. CASSOLA, *La recezione del Diritto civile nel Diritto canonico* (Rome 1969), p. 95; P. CIPROTTI, *Contributo alla teoria della canonizzazione delle leggi civili* (Rome 1941), p. 37.

This canonization is nothing more than a concrete application in the provision for contracts generally established in c. 22: "Leges civiles ad quas ius Ecclesiae remittit, in iure canonico iisdem cum effectibus serventur, quatenus iuri divino non sint contrariae et nisi aliud iure canonico caveatur."

The phrase *quoad res potestati regiminis Ecclesiae subiectas* expresses the idea that this canonization is extended not only to contracts concerning ecclesiastical goods, as might appear at first sight, but to any type of contract, payment, and obligation. Because of its object or because of the persons intervening, it therefore falls within the power of governance of the Church,[2] as jurisprudence has pointed out in certain sentences as provided in c. 1529 of *CIC*/1917, that immediately precedes the canon we are commenting on.[3]

Taking all this into consideration, civil norms applicable to contracts would include anything referring to the capacity to contract (with the exceptions prescribed for religious in c. 668), and referring to consent, purpose, and cause of a contract, the forms and procedures required to fulfill a contract, the effects on the two parties, assignees, and third parties, and anything related to the creation, modification and termination of obligations.[4]

3. Only two exceptions are established to this effect (the same as those in c. 22): if the civil norms are contrary to divine law—natural or positive—as, for example the civil norms that do not require *bona fides* during the entire period of the prescription, as established in c. 198); and if there is a canonical norm on the matter, in which case the canonical norm will logically prevail over the civil norm. Thus, for example, the canon itself expressly cites c. 1547, according to which in canonical law, proof by means of witness in the matter of contracts is always admissible, contrary to the case in some civil legislation. Special periods of time as established in c. 1270 for extinctive prescription would also be included in this category.

4. The allusion to c. 1547—a procedural norm—leads us to clarify that the canonization operated by this canon refers to substantive civil law. As long as there is any controversy and an ecclesiastical tribunal intervenes under the terms of cc. 1400 and 1401, the applicable procedural norms will logically be canonical norms.

5. The term *de contractibus* appears to offer no doubts about its meaning and scope, but the term *de solutionibus*, translated in the official Spanish version by the term *pagos* [payments], seems open to amplification,

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2. Cf. P. LOMBARDÍA, "El canon 1529: problemas que en torno a él se plantean," in *Escritos de Derecho canónico*, I (Pamplona 1973), pp. 11–12.

3. Cf. C. JULLIEN, December 10, 1932, in *SRR Dec* 24 (1932), pp. 504–517; C. JULLIEN, July 5, 1927, in *SRR Dec* 19 (1927), pp. 261–275.

4. Cf. A. DE FUENMAYOR, "La recepción del derecho de obligaciones operada por el *Codex Iuris Canonici*," in *Revista Española de Derecho Canónico* 4 (1949), p. 301.

following the meaning it always had in canonical tradition, that of "extinction [termination] of obligations," which is broader, and including in the concept of obligations both contractual obligations and extracontractual obligations.[5] Thus, for example, in a sentence C. Grazioli says that "nomine solutionum (see c. 1529) veniunt obligationes quomodocumque susceptae."[6] And in another C. Jullien affirms that "per *solutionem* vero intelligitur non solum numeratio pecuniae, seu praestatio aliqua, sed omnis satisfactio pro 'omni obligatione sive per ultroneam promissionem sive alio quovis modo contracta' (Reinffenstuel, *Liber* III, tit. 23, *De solutionibus*, no. 2)."[7]

6. In Spain, except for possible express prescriptions in canon law, the general norms on contracts in the civil and commercial codes, and in government contract law, will be applicable. Particular or special legislation on some types of contracts will have to be taken into account, such as the laws on non-urban leases and urban leases, mortgage laws, and the laws on the sale of movable goods by installments, etc., and also the corresponding autonomous laws and the norms of the European Community with reference to contracts and payments that are applicable in Spain.

5. Cf. P. LOMBARDÍA, "El canon 1529: problemas...," cit., pp. 30–36.
6. C. GRAZIOLI, May 30, 1939, in *SRR Dec* 31 (1939), p. 359, no. 7.
7. C. JULLIEN, June 26, 1937, in *SRR Dec* 29 (1937), p. 457, no. 9.

1291 **Ad valide alienanda bona, quae personae iuridicae publicae ex legitima assignatione patrimonium stabile constituunt et quorum valor summam iure definitam excedit, requiritur licentia auctoritatis ad normam iuris competentis.**

The permission of the authority competent by law is required for the valid alienation of goods which, by lawful assignment, constitute the stable patrimony of a public juridical person, whenever their value exceeds the sum determined by law.

SOURCES: c. 1530 § 1,3°; SCCouncil Resol., 17 maii 1919 (*AAS* 11 [1919] 382–387); SCCouncil Resol., 12 iul. 1919 (*AAS* 11 [1919] 416–419); CodCom Resp., 24 nov. 1920 (*AAS* 12 [1920] 577); SC-Council Litt. circ., 20 iun. 1929, art. 41 (*AAS* 21 [1929] 384–399); SCCE Decl. (Prot. 427/70/15), 2 ian. 1974; SCCE-SCRSI Decl. (Prot. 300/74), 7 oct. 1974

CROSS REFERENCES: cc. 10, 116, 1257 § 1, 1292, 1295

COMMENTARY

Joaquín Mantecón

Alienation consists in transferring full ownership of goods to a third person by an "inter vivos" act, onerously (a sale, for example) or gratuitously (a donation). Therefore the following would be included in this concept: buying and selling, donations, exchanges, credit transfers, etc. With reference to the concept of the "stable patrimony" of a public juridical person (the only person whose goods are considered to be ecclesiastical), it cannot, as previously stated, be confused or identified with immovable goods, although logically it is a part of them. Stable patrimony would rather include all goods required by the public juridical person to achieve its proper institutional purposes; that is, it would also include the goods without which it could not exist or adequately achieve the purpose for which it was created. In fact, moveable goods, equities, money invested in fixed assets, etc., could also be included in the concept, provided that they were permanently allocated to provide for the needs and purposes of the juridical person in question.[1]

1. Cf. *Comm.* 16 (1984), p. 35.

This canon also makes a condition for requiring permission to alienate goods: they must form the stable patrimony "by lawful assignment," that is, they must be goods whose stability or attachment to the stable patrimonial fund of the juridical person has been determined by its own statutes or by its competent bodies, or, if applicable, by lawful authority or by law.

Not included in this provision are goods that, even though they may have a value greater than the amount established by law, are not a part of the person's stable patrimony; this would be quite a rare case. Also not included are goods that belong to the stable patrimony but that do not exceed the established sum.

The permission to be granted by the competent authority is required only if the value of the goods in question exceeds the amount determined by law, and then the provisions of c. 1292 will have to be followed. The same is true with regard to identifying who the competent authority will be.

In these cases, that is, when it is a case of alienating goods belonging to the stable patrimony of the public juridical person by lawful assignment, and when the value of the goods is greater than the lawfully established value, the permission to be granted by the competent authority is expressly required for the act of alienation to be valid. Therefore, if alienation were completed without permission, the transaction would be invalid and null as a matter of law (c. 10). In addition, c. 1377 provides for imposing a just penalty upon any person responsible for alienation without the required permission, and that person would normally be the administrator.

As indicated in c. 1295, these norms on the alienation of ecclesiastical goods are also to be applied to any type of contract or operation by which the patrimonial situation of the public juridical person could be endangered, even when there is no alienation in the strict sense, as, for example, the establishment or recognition of a lien on the goods in question, a mortgage on the goods or assigning value of the goods, etc., provided that the goods belong to the stable patrimony of the person by lawful assignment and the value exceeds the amount established by law.

1292 **§ 1. Salvo praescripto can. 638 § 3, cum valor bonorum, quorum alienatio proponitur, continetur intra summam minimam et summam maximam ab Episcoporum conferentia pro sua cuiusque regione definiendas, auctoritas competens, si agatur de personis iuridicis Episcopo dioecesano non subiectis, propriis determinatur statutis secus, auctoritas competens est Episcopus dioecesanus cum consensu consilii a rebus oeconomicis et collegii consultorum necnon eorum quorum interest. Eorundem quoque consensu eget ipse Episcopus dioecesanus ad bona dioecesis alienanda.**

§ 2. Si tamen agatur de rebus quarum valor summam maximam excedit, vel de rebus ex voto Ecclesiae donatis, vel de rebus pretiosis artis vel historiae causa, ad validitatem alienationis requiritur insuper licentia Sanctae Sedis.

§ 3. Si res alienanda sit divisibilis, in petenda licentia pro alienatione exprimi debent partes antea alienatae; secus licentia irrita est.

§ 4. Ii, qui in alienandis bonis consilio vel consensu partem habere debent, ne praebeant consilium vel consensum nisi prius exacte fuerint edocti tam de statu oeconomico personae iuridicae cuius bona alienanda proponuntur, quam de alienationibus iam peractis.

§ 1. Without prejudice to the provisions of Can. 638 § 3, when the amount of the goods to be alienated is between the minimum and maximum sums to be established by the bishops' conference for its region, the competent authority in the case of juridical persons not subject to the diocesan bishop is determined by the juridical person's own statutes. In other cases, the competent authority is the diocesan bishop acting with the consent of the finance committee, of the college of consultors, and of any interested parties. The diocesan bishop needs the consent of these same persons to alienate goods which belong to the diocese itself.

§ 2. The additional permission of the Holy See is required for the valid alienation of goods whose value exceeds the maximum sum, or if it is a question of alienation of something given to the Church by reason of a vow, or of objects which are precious by reason of their artistic or historical significance.

§ 3. When a request is made to alienate goods which are divisible, the request must state what parts have already been alienated; otherwise, the permission is invalid.

§ 4. Those who must give advice about or consent to the alienation of goods are not to give this advice or consent until they have first been informed precisely both about the economic situation of the juridical person whose goods it is proposed to alienate and about alienations which have already taken place.

SOURCES: § 1: c. 1532 § 3; SCCouncil Resol., 17 maii 1919 (*AAS* 11 [1919] 382–387); SCCouncil Resol., 12 iul. 1919 (*AAS* 11 [1919] 416–419); CodCom Resp., 24 nov. 1920 (*AAS* 12 [1920] 577); SCCouncil Resp., 14 ian. 1922 (*AAS* 14 [1922] 160–161); *PM* I, 32
§ 2: c. 1532 § 1; SCCouncil Resol., 12 iul. 1919 (*AAS* 11 [1919] 416–419); CodCom Resp. V, 20 iul. 1929 (*AAS* 21 [1929] 574); SCCouncil Normae, 24 maii 1939 (*AAS* 31 [1939] 266–268); SCCouncil Let., 1 iul. 1941; SCCouncil Decr. *Cum mutata nummorum*, 13 iul. 1951 (*AAS* 43 [1951] 602–603); *SCCong Notif.*, 25 iul. 1952; *SCCong Notif.* 18 oct. 1952; *SCCong* Facul., 27 apr. 1953; *SCCong Notif.*, 28 iun. 1958; *SCCong* Litt. circ., 11 apr 1971 (*AAS* 63 [1971] 315–316); Sancta Sedes *Notif.*, 1978
§ 3: c. 1532 § 4; SCPF Resp., 10 iul. 1920

CROSS REFERENCES: cc. 127 §§ 1 et 2, 638 § 3, 1190 §§ 2 et 3, 1256, 1273 et 1276 § 1

COMMENTARY

Joaquín Mantecón

1. For the purpose of determining who is the competent authority to grant the permission required for valid alienation of ecclesiastical goods, it must be determined whether the value of the goods falls below, between, or above certain minimum and maximum values that the bishops' conferences are to set for their respective regions.

If the value of goods to alienate is lower than the prescribed minimum, no permission is required nor is any special procedure stated, except for the case covered in c. 1298.

If the value falls between the minimum and maximum limits, the authority competent to grant permission depends upon whether the juridical person wanting the alienation is subject to the diocesan bishop. If it is not subject to him, the authority shall be determined by the statutes of the juridical person. The most usual case of a public juridical person not subject

to the bishop will be a supradiocesan juridical person, dependent, for example, upon the bishops' conference.

But if the public juridical person is subject to the bishop, the bishop is the one to grant permission, and the permission should be given with the consent of the financial committee, the college of consultors, and the interested parties themselves. The same consents are required to alienate goods belonging to the diocese. This procedure by the bishop is explained by c. 1276 § 1, that attributes to him vigilance over the administration of all goods belonging to the public juridical persons under his jurisdiction.

2. The prescribed consents are required to validate the permission, and, as we shall see, only indirectly can they also affect the validity of alienation. Canon 127 § 1 stipulates that "When the law prescribes that, in order to perform a juridical act, a superior requires the consent or the advice of some college or group of persons ... For the validity of the act, it is required that the consent be obtained of an absolute majority of those present, or that the advice of all be sought"; and § 2,1°, specifies that "if consent is required, the superior's act is invalid if the superior does not seek the consent of those persons, or acts against the vote of all or any of them."

So for the permission granted by the bishop to be valid, two groups (the finance committee and the college of consultors) and the interested parties must necessarily consent. With regard to the interested parties, they are understood to be the persons with a lawful interest by virtue of holding rights (real or personal) over the goods to be alienated, or because they will be directly affected by the alienation.

And so, if permission were to be given without the required consent, it would be invalid. However, alienation made by virtue of such permission would not necessarily be invalid, but could be annulled. If permission were granted with the appearance of legality, and given the good faith of the administrators and buyers—who are not obligated to know the defects of the permission—it would be in effect until annulled by judicial decision.[1]

3. For goods that religious institutes wish to alienate, c. 638 § 3 will have to be followed. According to this canon, for the valid alienation of any goods that might be prejudicial for the religious institute, written permission from the competent superior is required, with the consent of his committee. And for alienation that is special due to the amount (greater than what the Holy See determines, for that is who determines the amount for the religious) or to its type (ex-votos, objects of particular artistic or historical value), permission will have to be granted by the Holy See.

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1. Cf. M.G. MORENO ANTÓN, *La enajenación de bienes eclesiásticos en el ordenamiento jurídico español* (Salamanca 1987), p. 53.

4. If the value of the goods exceeds the maximum determined by the proper bishops' conference, in addition (*insuper*) to the permission stipulated as above, permission from the Holy See is required for the alienation to be valid. The same is true if the goods, regardless of their real monetary value, have a particular value due either to their type—ex-votos donated to the Church—or to their particular artistic or historic value, that transforms them into precious goods.

5. As for ex-votos, that is, goods donated to the Church because of a vow, the canon says nothing about their value (monetary, historical, or artistic). Theoretically, therefore, permission from the Holy See would have to be obtained even if the value is not great since, as was noted during the reform of the Code, this is a matter that affects the piety of the faithful.[2] With regard to ex-votos, the Sacred Congregation of the Council had stated in 1922 that permission was required even if the donor was in favor of alienation, and it established that objects like ex-votos donated to a church or advocation implied the presumption of a vow.[3] For these same reasons, c. 1190 requires the same permission from the Holy See for the alienation—and even for a transfer in perpetuity to a different place—of relics of great importance or veneration among the people.

As for precious goods "artis vel historiae causa," their condition as such is independent of their monetary value. It is possible that they might not exceed the maximum, or even that they fall under the minimum. In any case, permission from the Holy See must be requested. Therefore, a distinction must be made between their condition as precious goods for historical or artistic reasons, a condition that will be attributed to them by the corresponding ecclesiastical or civil bodies,[4] and their concrete monetary value, which will be assessed by experts in each type.

For both ex-votos and goods that are precious for artistic or historical reasons, the requisite of permission as explained above is always necessary, even if the goods are not part of the stable patrimony of the juridical person (and as has also been pointed out, independently of their actual monetary value).

6. The role of the Holy See can be explained as due to the Roman Pontiff 's condition as supreme administrator and steward of ecclesiastical goods by virtue of his primacy in governance (c. 1273); thus in practice he exercises the highest vigilance over the goods so that their alienation does not result in impoverishment of the particular churches that would prevent them from achieving their proper purposes (c. 1254 § 2).[5] This is nothing more than a manifestation, in the area of patrimony, of his full and

2. Cf. *Comm.* 12 (1980), p. 424.
3. Cf. *AAS* 14 (1922), pp. 160–161.
4. Cf. F.R. AZNAR GIL, *La administración de los bienes temporales de la Iglesia* (Salamanca 1984), p. 222.
5. Cf. *Relatio* 1982, p. 289.

supreme power over the entire Church.[6] According to *Pastor Bonus* 98, the competent body for granting permission in the name of the Holy See concerning matters of ecclesiastical goods is the Congregation for Clergy.

For divisible goods of which one of its parts has already been alienated, when permission is requested, these facts must be clearly stated. If there is obreption or subreption, the permission would be invalid (this is a practical application of c. 63). This is to prevent avoidance of canonical controls by parceling out goods of high value.

7. As indicated in § 4, everyone called upon by law to give an opinion or consent in the alienation of goods shall exercise this function only after having been truly and sufficiently informed about the financial situation of the juridical person whose goods are to be alienated, and also about any previous alienations. The obligation to inform falls upon the responsible persons (the administrators) of the juridical persons, but the persons obligated to give advice or consent must also take care to obtain such information and ensure that it is sufficient and reflects the truth.

8. For the purposes of implementing the stipulations of this canon, the bishops' conference of Spain, in its first General Decree of November 26, 1983, prescribed a minimum amount of five million pesetas and a maximum of fifty million pesetas (Art. 14, 2).[7] At a later date, in its LIII Plenary Assembly, held November 19–24, 1990, it was agreed to modify that article and the minimum was set at ten million pesetas and the maximum at one hundred million pesetas. The Congregation for Bishops ratified that agreement on April 11, 1992.[8]

6. Cf. J.T. MARTÍN DE AGAR, "Bienes temporales y misión de la Iglesia," in *Manual de Derecho canónico*, 2nd ed. (Pamplona 1991), pp. 706–707.
7. Cf. *BOCEE* 1 (1984), p. 103.
8. Cf. *BOCEE* 35 (1992), p. 151.

1293 **§ 1. Ad alienanda bona, quorum valor summam minimam definitam excedit, requiritur insuper:**

1° iusta causa, veluti urgens necessitas, evidens utilitas, pietas, caritas vel gravis alia ratio pastoralis;

2° aestimatio rei alienandae a peritis scripto facta.

§ 2. Aliae quoque cautelae a legitima auctoritate praescriptae serventur, ut Ecclesiae damnum vitetur.

§ 1. To alienate goods whose value exceeds the determined minimum sum, it is also required that there be:

1° a just reason, such as urgent necessity, evident advantage, or a religious, charitable or other grave pastoral reason;

2° an evaluation in writing by experts of the goods to be alienated.

§ 2. To avoid loss to the Church, any other precautions drawn up by lawful authority are also to be followed.

SOURCES: § 1: c. 1530 § 1; *SCCong* Litt. circ., 11 apr. 1971 (*AAS* 63 [1971] 315–317)
§ 2: c. 1530 § 2

CROSS REFERENCES: c. 1292

COMMENTARY

Joaquín Mantecón

1. This canon concerns the alienation of goods of an amount exceeding the minimum value determined by the bishops' conference. In such a case, two requirements are established as necessary for the legality of alienation, in addition to permission which is required under the provisions of the preceding canon. It is not specified that this is required for validity (cf. c. 10). The requisites are that there must be "iusta causa" giving the reason for alienation and also giving expert valuation of the goods, which must be in writing.

a) The fact that the evaluation must be performed "a peritis," in the plural, but without a specific number given, implies that there must definitely be at least two and that, in addition, as previously pointed out, they must submit their report in writing. *CIC*/1917 also expressly required the experts to be honest (see c. 1530 § 1,1°). The fact that honesty is not now expressly required is that it is assumed to be obvious.

Although the basic idea is that valuation is a requirement for alienating goods with a value exceeding the minimum amount established by law, in many cases, when the possibility of alienating goods is proposed, it is possible that it is not known whether the value exceeds or does not exceed said minimum amount. Thus expert valuation will be the only means to dispel the doubt. It is in the long run a guarantee that the juridical person will not alienate goods for less than their actual value.

The amount given by the valuation will determine the authority from whom permission must be requested for the alienation to be valid, according to the rules in c. 1292. Thus, valuation of goods over the maximum established by law requires a request for permission from the Holy See, even though later—for whatever reason—the sale is made at a lower price[1] (cf., however, c. 1294). And the opposite is true. If the valuation gives a lower value, no permission need be requested, even though later the actual sale price may be higher.[2]

b) As to just cause, the canon itself lists as non-exhaustive examples urgent necessity, evident advantage, religious, charitable, and other reasons, provided that they are of a pastoral and grave nature. The list is broad enough to include any reasonable cause within the concept of just cause, so long as in the final analysis it is pastoral in nature. In this regard, the new norm is more explicit than the old c. 1530, which spoke only of "urgens necessitas, vel evidens utilitas Ecclesiae, vel pietas."

c) With regard to the connotations specified for each case, it is noteworthy that in addition to necessity, it is specified that it must be "urgent" (that means entailing the threat of some ill effect or danger if alienation does not take place). The adjective used with advantage is "evident" (that is, it must bring a clear advantage). But nothing like that is indicated when the cause is religious or charitable. It is possible that the adjective "grave" could be applied to them, for it is required when the just cause is for a "pastoral reason"; that, in any case, appears to be the implication of the way the canon uses the disjunctive *vel* ("pietas, caritas vel gravis alia ratio pastoralis"). In the law prior to the Code, with reference to religious causes, the cases of ransoming captives, aiding the poor, and burying the dead were specified.

2. The reference in § 2 of the canon is to "other precautions" that may be imposed by the competent authority to ensure that alienation causes no unforeseen harm through negligence or carelessness. This means that the competent authority may determine any precautionary measures that will ensure a good outcome for alienation. Thus, for exam-

1. Cf. J.L. SANTOS DÍEZ, "La administración extraordinaria de los bienes eclesiásticos," in *XIX Semana Española de Derecho Canónico: El Derecho patrimonial canónico en España* (Salamanca 1985), p. 49.
2. Cf. *Resp.* of the CPI, November 24, 1920, in *AAS* 12 (1920), p. 161.

ple, the authority could urge the consolidation of future or deferred payments, updated monetary clauses for these cases, a cancellation clause, or a condition specifying invalidity under civil jurisdiction if there were canonical invalidity—to avoid occurrence of the possibility indicated in c. 1296, etc.

The authority competent to determine these precautions will be the same one that is to grant permission, according to the criteria listed in c. 1292.

1294 **§ 1. Res alienari minore pretio ordinarie non debet, quam quod in aestimatione indicatur.**

§ 2. Pecunia ex alienatione percepta vel in commodum Ecclesiae caute collocetur vel, iuxta alienationis fines, prudenter erogetur.

§ 1. Normally goods must not be alienated for a price lower than that given in the valuation.

§ 2. The money obtained from alienation must be carefully invested for the benefit of the Church, or prudently expended according to the purposes of the alienation.

SOURCES: § 1: c. 1531 § 1
§ 2: c. 1531 § 3; CodCom Resp. (Praesidis), 17 feb. 1920; SC-Council Decl., 17 dec. 1951 (*AAS* 44 [1952] 44)

CROSS REFERENCES: cc. 1292, 1293, 1295

COMMENTARY

Joaquín Mantecón

1. We are still considering alienation of goods that exceed the minimum value determined by law (c. 1293 § 1). Therefore, these are conditions that must be applied when permission is required from the bishop and the Holy See (1292 § 1 and 2). When § 1 indicates that an "ordinarie" thing may not be alienated for a price lower than that given in the valuation, it does not exclude the possibility that in some cases that are conceivably not ordinary, it could be alienated for a price lower than the valuation due to the impossibility of alienation at the price established by the experts. An example is that there is no buyer at the price offered, among other reasons.

Logically, deciding whether the case is extraordinary, and evaluating the opportunity to alienate at a lower price will fall to the authority who grants the required permission for valid alienation. The prescribed opinion, if applicable, of the financial committees and consultors ensures that the decision will be reasonable and not harmful to the interests of the diocese.

2. Paragraph 2 establishes what use should be made of the money received from alienation: it will be applied to the specific purpose for which the alienation was carried out. This will be the most usual case—or it will be "in commodum Ecclesiae caute collocetur," which means that the

proceeds must be invested so as to bring a clear financial advantage to the juridical person who alienated the goods. This last case will be a typical alienation in which the just cause consists of "evidens utilitas" for the juridical person (c. 1293 § 1,1°).

The Sacred Congregation of the Council established that the proceeds from this type of alienation of ecclesiastical goods must be invested only in the acquisition of immovable goods.[1] The meaning of this canon suggests that this prescription is no longer effective and can therefore be invested in other areas.

The term "caute" refers to the prudence that must be exercised and that must be guided by seeking a safe investment and avoiding any danger or fortuitous risk. Therefore, if the investment involves any risk, especially if it is from a certain entity, it must be avoided and a safer investment or alternative must be chosen.

1. Cf. *AAS* 44 (1952), p. 44.

1295 **Requisita ad normam cann. 1291–1294, quibus etiam statuta personarum iuridicarum conformanda sunt, servari debent non solum in alienatione, sed etiam in quolibet negotio, quo condicio patrimonialis personae iuridicae peior fieri possit.**

The provisions of cann. 1291–1994, to which the statutes of juridical persons are to conform, must be observed not only in alienation, but also in any transaction whereby the patrimonial condition of the juridical person could be adversely affected.

SOURCES: c. 1533; SCCouncil Normae, 24 maii 1939 (*AAS* 31 [1939] 266–268)

CROSS REFERENCES: cc. 117, 1291–1294

COMMENTARY

Joaquín Mantecón

1. This canon provides that all requirements and conditions established for alienation in the strict sense of the word, and stipulated in the preceding canons, must also be applied to any juridical transactions or operations that might be detrimental to a juridical person's patrimony.

That is, for the *CIC*, alienation is a juridical act by which ownership or rights over something is transferred to any person. It is equivalent to any act that might harm or diminish the capacity to dispose of the goods owned, even though ownership of the thing is preserved. Examples of this include leasing the goods, assigning usufruct, establishing mortgages, accepting easement, enfiteusis, assigning administration "in perpetuum," transactions, etc., and generally, any transfer by which a real right over ecclesiastical goods is assigned to third parties. Previously in *PM* 32 the following were mentioned as acts equivalent to alienation: security interest, mortgages, leasing, enfiteusis, and contracting debts for an amount greater than the maximum set by the bishops' conference. The text of the code, however, has preferred to use generic but sufficiently clear terms.

The canon considers that a public juridical person could contract some type of obligation that assumed the person to be in the position of debtor, since the debtor is responsible for paying the debt with all present and future goods. There is a risk that after the due date has passed without the debt being paid, the creditor may take payment from the goods of

the debtor, thus clearly compromising the patrimony.[1] On the other hand, the following are not considered to be acts equivalent to alienation: expropriation, payment of duly contracted debts, waiver of a donation or inheritance, etc.

It is understood that insofar as there are civil norms on operations equivalent to alienation, those norms would also have to be applied according to general canonization under c. 1290.

2. In addition, this canon also establishes that the specific requisites of the previous canons (1291–1294) should be taken into account at the time of drawing up the statutes of juridical persons, so as to adapt the statutes to the provisions of those canons. Although the canon does not specify that it concerns public juridical persons, this will be the case in light of c. 1257 § 2. The opposite would be the equivalent of eliminating the distinction made by the legal regimen applicable both to ecclesiastical goods as well as those that are not.

If the statutes did not follow this norm, they could not be approved by the competent authority. Therefore they also could not be erected as public juridical persons, since approval of the statutes is a prior and a necessary assumption to granting juridical personality (c. 117).

1. Cf. M.G. MORENO ANTÓN, *La enajenación de bienes eclesiásticos en el ordenamiento jurídico español* (Salamanca 1987), pp. 23–24.

1296 **Si quando bona ecclesiastica sine debitis quidem sollemnitatibus canonicis alienata fuerint, sed alienatio sit civiliter valida, auctoritatis competentis est decernere, omnibus mature perpensis, an et qualis actio, personalis scilicet vel realis, a quonam et contra quemnam instituenda sit ad Ecclesiae iura vindicanda.**

When alienation has taken place without the prescribed canonical formalities, but is valid in civil law, the competent authority must carefully weigh all the circumstances and decide whether, and if so what, action is to be taken, namely personal or real, by whom and against whom, to vindicate the rights of the Church.

SOURCES: c. 1534 § 1

CROSS REFERENCES: cc. 429 § 1, 1377, 1729

COMMENTARY

Joaquín Mantecón

1. Normally civil laws do not take into account the provisions established in canonical law on the validity of alienation. Therefore, it may happen that alienation, which is invalid for the Church because of failure to comply with a requirement of validity, may be perfectly valid for the State. Consequently, this places the Church in a delicate situation with regard to defending its patrimony.

This canon aims to establish criteria or norms for acting that are prudent in nature, so that the competent ecclesiastical authority may evaluate the suitability of defending its interests in civil jurisdiction and the more practical and appropriate specific means of so doing.

2. The canon imposes no specific remedy, and therefore any lawful remedy could theoretically be used. Logically, before making any such decision, the competent authority should be advised by experts in civil law who will inform it of the best specific steps to take to vindicate the Church's rights. On occasion, canon law can be cited in a civil jurisdiction as statutory law, or action can be brought against the responsible person to compensate for damages (c. 1729), etc., without prejudice to the just penalty that can be imposed upon the person responsible for an alienation carried out without obtaining the prescribed permission under the terms of c. 1377. In the final analysis, the canonically invalid action could always

be healed at the root by the competent authority; in many cases this would, in fact, be the only viable solution.[1]

3. In the case of a diocesan bishop, the most appropriate bodies to evaluate it will be the financial affairs committee, since its members are necessarily experts in financial matters and in civil law (c. 492 § 1), and the college of consultors, as the most suitable body to evaluate the pastoral repercussions of the measures to be taken.

4. In Spain, during the life of the 1953 Concordat, both positive legislation and jurisprudence fully accepted the civil effects of canon law on these matters. They considered any transactions that were previously invalid under canon law to be invalid in civil jurisdiction also. At present, the Agreement on Juridical Affairs of January 3, 1979 provides that for orders, religious congregations, and institutes of consecrated life, "for the purposes of determining the extent and limits of their capacity to act and therefore to dispose of their goods, the provisions of canon law shall govern and shall act in this case like statutory law" (art. I, 4). Nothing is said, however, about the capacity of other ecclesiastical entities to dispose, such as those belonging to the organic and jurisdictional structure of the Church (dioceses, parishes, etc.). But the Agreement grants them civil juridical personality insofar as they enjoy canonical personality (art. I, 2). According to the fourth paragraph, it is to be understood that juridical personality carries with it the full capacity to act, as reiterated in the first Transitional Clause, in reference to religious entities.

Canonical doctrine holds that by analogy with what is established for religious entities, such recognition should be applied to the other cases in which public ecclesiastical persons intervene.[2] It must be applied at least to the persons that make up the Church's hierarchy and whose juridical personality—and therefore their capacity to act—is recognized in the Agreement,[3] as we have seen. Otherwise, it would mean introducing a discriminatory criterion between religious entities and the other public entities of the Church.

In Italy, in the Villa Madama Agreements of February 18, 1984, clearer terms were used; they make no distinctions between the different types of ecclesiastical entities. The agreements state that in administering their goods, ecclesiastical entities—all of them—will be subject to the controls provided under canon law. For acquiring goods, however, common law is applied (art. 7,5°).

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1. Cf. V. DE PAOLIS, "De bonis Ecclesiae temporalibus in novo Codice Iuris Canonici," in *Periodica* 73 (1984), p. 147.
2. Cf. M. LÓPEZ ALARCÓN, "Eficacia civil de la licencia para la enajenación de bienes eclesiásticos," in *Ius Canonicum* 29 (1989), p. 318.
3. Cf. D. LLAMAZARES, *Derecho eclesiástico del Estado* (Madrid 1989), pp. 715–716.

1297 **Conferentiae Episcoporum est, attentis locorum adiunctis, normas statuere de bonis Ecclesiae locandis, praesertim de licentia a competenti auctoritate ecclesiastica obtinenda.**

It is the duty of the bishops' conference, taking into account the local circumstances, to determine norms about the leasing of ecclesiastical goods, especially about permission to be obtained from the competent ecclesiastical authority.

SOURCES: c. 1541

CROSS REFERENCES: cc. 1290–1296

COMMENTARY

Joaquín Mantecón

1. A lease is a contract by which, in exchange for compensation—usually monetary in nature—one of the contracting parties is obligated to provide the other with the use and enjoyment of something. In civil law, leases for things, work, or services are usually differentiated. The type of lease directly concerned in this canon is a lease of things that may be movable or immovable, and immovable things may be rural or urban. Although *CIC*/1917 established many precise conditions required for carrying out the leasing of ecclesiastical goods (cf. c. 1541), in the present case it was preferred to remit the norms for this matter to the bishops' conference.

2. In the process of reforming the Code, at one time it appeared that there would be direct canonization of civil laws in the matter of leases. Thus c. 42 of the *Schema* of 1977 provided that "in locatione bonorum serventur leges civiles." Later, however, it was preferred to include said remission in the more general remission of contracts ("quoad locationem quoque valet norma generalis can. 44, scilicet de remissione contractuum ad ius civile").[1] In the end, however, it was decided that the bishop would decide on the establishment of the norms, "attentis locorum adiunctis."

3. The canon distinguishes between norms on leases properly speaking, and norms pertaining to the permission to be granted by the competent ecclesiastical authority. The bishops' conference should pay particular attention to the norms on permission, and not idly, since permission is an effective medium of control to avoid any negative

1. *Comm.* 12 (1980), p. 427.

repercussion of leasing on the necessary patrimonial stability of juridical persons. This is especially true if permission is required "ad valorem."

4. In Spain in its first general Decree on supplementary norms to the *CIC*, the bishop's conference (November 26, 1983) provided that "leasing rural and urban ecclesiastical goods, included in c. 1297, was equivalent to alienation with regard to the requirements for granting permission" (art. 14.3). Therefore, for leasing ecclesiastical goods, the prescription in the Code on alienation of ecclesiastical goods will have to be followed. This is the case, particularly with regard to granting permission as an essential requisite for validity in cases so established (cc. 638, 1291 and 1292). In addition, by virtue of general canonization as provided in c. 1290, specific Spanish legislation on the matter would also apply, i.e., the Law on Urban Leasing and the Law on Rural Leasing.

Concerning leases, the criteria of the *CIC* on the value of the goods that require prior permission for alienation to be valid (cc. 1291–1292), the value to be considered is the value of the goods to be leased and not the amount for which they will be leased.

1298 **Nisi res sit minimi momenti, bona ecclesiastica propriis administratoribus eorumve propinquis usque ad quartum consanguinitatis vel affinitatis gradum non sunt vendenda aut locanda sine speciali competentis auctoritatis licentia scripto data.**

Unless they are of little value, ecclesiastical goods are not to be sold or leased to the administrators themselves or to their relatives up to the fourth degree of consanguinity or affinity, without the special written permission of the competent authority.

SOURCES: c. 1540

CROSS REFERENCES: cc. 108–109

COMMENTARY

Joaquín Mantecón

This canon is inherited from *CIC*/1917 and has a long-established tradition in canonical legislation (see c. 1540, *CIC*/1917). Practically the only variation introduced is that granting permission is attributed not to the ordinary of the place but more generically to the competent ecclesiastical authority.

As it will most usually happen in these cases, if the sale is of goods that do not belong to the stable patrimony of the juridical person and the goods have a lower value than the minimum set by the bishops' conference, it will be the nature of the juridical person that determines which authority should grant permission: the religious superior (if the goods belong to a religious *institutio*), the bishop (if it is a person from a diocese or subject to the bishop) or the person indicated in the statutes (if the juridical person is not diocesan).

Determining the value of the thing the administrators want to buy or lease for themselves, or sell or lease to their relatives, is understood to be the duty of the administrators themselves, who may determine the value from the inventory indicated in c. 1283, 2°. This inventory must list the description and value of the goods belonging to the juridical person. If the goods are not inventoried, however, the value may be determined according to the administrator's prudent estimate.

In addition, it must be considered that the value of the things included in this title is not exclusively a monetary value, but may occasionally be of a different nature (for example, ex-votos, mentioned in c. 1292

§ 2, which even though they may be of little value, require permission from the Holy See to be alienated. It is understood that when in doubt it will be the competent authority that settles the matter by granting or not granting permission.

The canon specifically mentions only "selling" or "leasing"; other actions are therefore excluded, such as those mentioned in c. 1295. Although they do not properly consist of alienation (or leasing), these actions would result in worsening the juridical person's financial condition.

Special permission is to be understood to mean permission granted "ad casum"; therefore, this case does not include generic permission (that is, for a specific but undetermined case) or general permission. Since it is not explicitly required for the validity of the sale or lease, it is understood that the permission given would affect only its lawfulness (cf. c. 10).

To determine the degrees of consanguinity or relationship, the rules established in cc. 108 and 109 will be followed. Because there is no distinction between the direct line and a collateral line, it is understood that the degrees mentioned refer to both lines. Therefore, in addition to the persons in the direct line, this includes also brothers and sisters, uncles and aunts, nieces and nephews, first cousins, and the equivalent in-laws (brothers-and sisters-in-law, uncles and aunts, nieces and nephews, and cousins)—all fall under the prohibition.

TITULUS IV
De piis voluntatibus in genere et de piis fundationibus

TITLE IV
Pious Dispositions in General and Pious Foundations

1299 **§ 1. Qui ex iure naturae et canonico libere valet de suis bonis statuere, potest ad causas pias, sive per actum inter vivos sive per actum mortis causa, bona relinquere.**

§ 2. In dispositionibus mortis causa in bonum Ecclesiae serventur, si fieri possit, sollemnitates iuris civilis; quae si omissae fuerint, heredes moneri debent de obligatione, qua tenentur, adimplendi testatoris voluntatem.

§ 1. Those who by natural law and by canon law can freely dispose of their goods may leave them to pious causes either by an act *inter vivos* or by an act *mortis causa.*

§ 2. In dispositions *mortis causa* in favour of the Church, the formalities of the civil law are as far as possible to be observed. If these formalities have been omitted, the heirs must be advised of their obligation to fulfil the intention of the testator.

SOURCES: § 1: c. 1513 § 1; SCCouncil Resol., 23 apr. 1927 (*AAS* 20 [1928] 362–364)
§ 2: c. 1513 § 2; CodCom Resp., 17 feb. 1930

CROSS REFERENCES: cc. 98, 1290

COMMENTARY

José María Vázquez García-Peñuela

1. The capacity to dispose of any or all of a person's patrimony for pious causes is determined by natural law and canon law insofar as canon law explicitly expresses any of the contents of natural law.

According to Fuenmayor, two consequences arise from that precept. First of all, "Provisions valid under secular law have no effect under ecclesiastical law if they are contrary to a lack of capacity or to any prohibition against dispositions in canon law or natural law." Second, "Dispositions to pious causes made by anyone without capacity, or ineffective merely due to civil prohibition, shall be valid if they are covered under natural law or canon law.[1]" It is usually deemed that under natural law anyone with the use of reason may dispose of his goods. However, it is doubtful that a minor with the use of reason may, on his own account, without the intervention of his parents or guardians, dispose of his goods since that is an act that appears to assume special discretion of judgment. From that point of view, it may be considered that the limits with regard to age indicated in civil laws for active *testamenti factio* are an explicit expression of natural law. Therefore, in the absence of a specific canonical prescription on the matter, these limits should be respected. In Spain, "the capacity to make a will established in art. 663 of the Civil Code is also effective in canon law for those subject thereto."[2] On the other hand, the limitations on passive *testamenti factio* found in art. 752 of the Spanish Civil Code have no canonical relevance ("Testamentary dispositions made by the testator during his final illness in favor of the priest who confesses him or the priest's relatives to the fourth degree or the priest's church, chapter, community or institute shall have no effect") and their validity is doubtful under Spanish law due to their discriminatory character.[3]

With regard to the canonical norms on the capacity to dispose of one's goods to pious causes, consideration must be given to the limitation for the religious that may derive from the superior's permission, as in § 2 of c. 668, and from voluntary or forced renunciation of one's goods prior to perpetual profession, also in that canon.

With regard to non-Catholics, there is nothing to prevent their donating or leaving their goods to pious causes, but, in that case, the relevant

1. A. DE FUENMAYOR, "Problemas que plantean los cánones 1.499 § 1 y 1.513 desde el punto de vista civil," in *Revista Española de Derecho canónico* 6 (1950), p. 423.
2. M. LÓPEZ ALARCÓN, "Legados píos," in *Nueva Enciclopedia Jurídica*, XIV (Barcelona 1986), p. 871.
3. Cf. L. TERRADAS SOLER, *La llamada prohibición de confesores* (Madrid 1948); S. DÍAZ ALABART, "Artículo 752," in *Comentarios al Código civil y compilaciones forales*, X–1, pp. 109–136.

element for the disposition to be considered pious is the juridical intention, as stated in the external legal system, rather than the moral or internal intention.[4]

Finally, with regard to testators, nothing prevents them from also acting as such juridical persons, either ecclesiastical or civil, provided, naturally, they do it through their lawful systems.

As to the object of the act of disposition, the expression *suis bonis* should not be taken in the sense that one cannot make legacies of goods belonging to others.[5] In addition, and if applicable, the special norms should be followed that refer to the alienation of sacred and precious things in titles I and III of this book.

2. In a study on c. 1513 *CIC*/1917 (the wording of which is similar to the current canon and therefore its value is retained), Fuenmayor's opinion is that § 2 contains a canonizing norm of limited scope,[6] since the interpolation of *si fieri possit* makes the prescription on the observance of civil formalities not absolutely obligatory, but precisely insofar as possible. They cannot be observed, for example, if there are persecutory regimens in which fiduciary figures or interpository mechanisms are required. That will not be the most frequent case, but in practice, omission will be due to lack of knowledge or accident.

Historically, however, one of the numerous privileges of pious causes was the validity of testaments in their favor, even though they lacked the formalities required under civil law. Specifically, a testament was deemed sufficient if it was given before two witnesses.[7] At present, for a testament without form, rather than making it valid under canon law, the legislator mandates that the heirs be advised of their obligation to fulfill the intention of the testator. This mandate is understood as being directed to the ordinary, who is the eminent executor of pious intentions and logically, just as in the actual execution, may act through third parties. Evidently, a suit cannot be brought under civil law for this obligation, which is more than juridical; ecclesiastical authorities may only appeal to the conscience of the heirs and successors. Because book VI does not indicate any type of crime under which unwillingness on the part of the heirs could be included, the possibility of forcing fulfillment of last wishes

4. Cf. I. VISSER, "De solemnitatibus piarum voluntatum in Iure Canonico," in *Apollinaris* 20 (1947), pp. 63ff. Cf. also: J.M. SETIÉN, "La intencionalidad en las causas pías," in *Scriptorium Victoriense* 2 (1955), pp. 280–310; W. ONCLIN, "De donationibus aut largitionibus ad causas pias a non catholicis factis," in *Analecta Gregoriana*, 69 (1955), pp. 191–200; P. HUIZING, "De donatione ad causam piam facta a non baptizato," in *Periodica* 43 (1954), pp. 287–304; and L. BENDER, "Donatio ad causam piam facta a infideli," in *Ephemerides Iuris Canonici* 11 (1955), pp. 439–478.

5. M. LÓPEZ ALARCÓN, "Legados píos," cit., p. 873.

6. A. DE FUENMAYOR, "Problemas...," cit., p. 423.

7. Cf. E. FERNÁNDEZ REGATILLO, "Problemas que plantea el canon 1513," in *Revista Española de Derecho canónico* 6 (1950), pp. 181–183.

by threatening to impose penalties is precluded by virtue of the principle of legality.

3. The imperative wording of the precept implies that the admonition is not given at the discretion of the ecclesiastical authority but should be made in any case even if it is not expected to be effective or will be poorly received. Since there are no indications in that regard, the manner of giving the admonition will be in the way that the ecclesiastical authority deems most appropriate, including in writing. According to some authors, based on the responses of the *Sacred Apostolic Penitentiary*, there is no difficulty with proceeding to a settlement with the heirs.[8] A different question is whether the heirs have in fact delivered the goods to the pious cause or ecclesiastical authority. Referring to the situation in Spain, according to Fuenmayor, if the heirs believe that the goods which at the time had been spontaneously delivered were given wrongly, and if because of that, they try to recover them, then it would be appropriate to apply the exception, based on art. 1901 of the Civil Code, that delivery was made for a just cause.[9]

In addition, although there is no express provision in the Code, the statement is clear that extra-legal dispositions *mortis causa* in favor of pious causes—that is, dispositions that harm the rights of the legal heirs—may be reduced in accordance with civil law, for it is understood that attribution of that part of the inheritance is a specific point of natural law.[10]

4. Finally, although the canon makes no reference to civil formalities in dispositions *inter vivos*, the omission must not be understood to mean that the formalities should not be observed, but rather that the legislator perhaps understood that their absence, different from testamentary formalities, is easier to remedy.

8. Cf. I. VISSER, "De solemnitatibus...," cit., p. 121; and E. FERNÁNDEZ REGATILLO, "Problemas que plantea el canon 1513...," cit., p. 283.

9. A. DE FUENMAYOR, "Problemas...," cit., p. 424.

10. Cf. J.J. RUBIO RODRÍGUEZ, "El 'favor iuris' de las causas pías ante la intangibilidad de la legítima en el Derecho común e hispano," in *Apollinaris* 62 (1989), pp. 81–84.

1300 Voluntates fidelium facultates suas in pias causas donantium vel relinquentium, sive per actum inter vivos sive per actum mortis causa, legitime acceptatae, diligentissime impleantur etiam circa modum administrationis et erogationis bonorum, firmo praescripto can. 1301, § 3.

The intentions of the faithful who give or leave goods to pious causes, whether by an act *inter vivos* or by an act *mortis causa,* once lawfully accepted, are to be most carefully observed, even in the manner of the administration and the expending of the goods, without prejudice to the provisions of Can. 1301 § 3.

SOURCES: c. 1514

CROSS REFERENCES: cc. 1284, 1310

COMMENTARY

José María Vázquez García-Peñuela

1. Although present in other passages in this title, it is in c. 1300 that we see the principle enshrined whereby the intentions of the testator are the law of pious causes. Nevertheless, the principle cannot be understood to be absolute, as the final section of the precept makes manifest when it refers to the impossibility of prohibiting the ordinary's intervention in executing pious causes.

The adverb *diligentissime* points to the legislator's interest in making this principle clear, for the reason that there is no doubt that the observance of the principle is an obligation of strict justice, even though current canon law regulation does not equate pious intentions, after acceptance, with a synallagmatic contract as did the old c. 1545.

2. In its wording, c. 1300 is very similar to c. 1514 of *CIC*/1917, other than the presence in c. 1300 of the interpolation *legitime acceptatae,* which was no doubt included as a technical improvement. According to Barroso de Oliveira,[1] the *CIC*/1917 legislator took the words for the canon from an Instruction by the SCPF in the year 1807 which said, "First and foremost natural and divine law demand, civil and canonical laws regulate, and in conclusion the Sacred Council of Trent earnestly and frequently recommends that the wills of those faithful who leave or give their

1. A. BARROSO DE OLIVEIRA, *Vontades pías (Estudo histórico-canónico)* (Vila Real 1959), p. 89.

goods to pious causes be most diligently fulfilled and that the money they produce be spent for those uses, in the manner and under the specific conditions for which they were intended by the donor and not diverted to others, even if they should seem better and more useful; were one to act otherwise, one would be defrauding the wills of the very faithful. This would entail great damage for the Church should the faithful withdraw such pious donations."[2]

3. The donor's will influences not only the determination of which goods are to be segregated from the patrimony and for what purposes they should be used, but also the manner in which they should be administered and invested. Administrators must take any instructions, if any, into account; furthermore, it is so prescribed in c. 1284 § 2, 3°. In many cases the founder's instructions pertaining to investing the endowment will depend upon the nature of the goods. If it is cash, he may indicate that it be invested in certain instruments, including giving the specific name of a commercial or financial company; or he may do the reverse and prohibit that it be invested in certain instruments. If the endowment consists of a functioning company, he may include clauses such as that it may not be sold, or that the employees' jobs are to be retained, etc. But the precept should be interpreted according to the principle *rebus sic stantibus*; for that reason, as López Alarcón points out, if with a change in circumstances, "it is determined that the method of administering and investing is harmful to the foundation and its purposes, and that it might ruin the foundation, the ordinary should correct the performance of the mandates so as to maintain the principle of conserving the foundation to fulfill the purposes intended by the founder."[3]

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2. *Collectanea SCPF,* I, no. 689: cit. ibid., p. 90.
3. M. LÓPEZ ALARCÓN, commentary on c. 1300, in *Pamplona Com.*

1301 **§ 1. Ordinarius omnium piarum voluntatum tam mortis causa quam inter vivos exsecutor est.**

§ 2. Hoc ex iure Ordinarius vigilare potest ac debet, etiam per visitationem, ut piae voluntates impleantur, eique ceteri exsecutores, perfuncti munere, reddere rationem tenentur.

§ 3. Clausulae huic Ordinarii iuri contrariae, ultimis voluntatibus adiectae, tamquam non appositae habeantur.

§ 1. The Ordinary is the executor of all pious dispositions whether made *mortis causa* or *inter vivos*.

§ 2. By this right the Ordinary can and must ensure, even by making a visitation, that pious dispositions are fulfilled. Other executors are to render him an account when they have finished their task.

§ 3. Any clause contrary to this right of the Ordinary which is added to a last will, is to be regarded as non-existent.

SOURCES: § 1: c. 1515 § 1
§ 2: c. 1515 § 2; CodCom Resp. IV, 25 iul. 1926 (*AAS* 18 [1926] 393)
§ 3: c. 1515 § 3

CROSS REFERENCES: cc. 134, 395–397, 1287 § 1, 1413,2°

COMMENTARY

José María Vázquez García-Peñuela

1. Maldonado accurately deemed that canon regulation of pious causes is based on two fundamental principles: respect for the intention of the testator (consecrated in the preceding canon) and the ordinary's vigilance over execution of the pious intentions[1] referred to in c. 1301.

2. Although § 1 also places the figure of executor with dispositions *inter vivos*, it historically arose in testamentary succession. The executor was executor of the testament. His origins are far from clear; it is not known for certain if they are Germanic or if there was some precedent in Roman law. There are even authors who say that the testamentary

1. J. MALDONADO AND FERNÁNDEZ DEL TORCO, "Las causas pías ante el Derecho civil," in *Revista Española de Derecho canónico* 6 (1950), p. 457.

executor is clearly a medieval creation.[2] What is certain is that the figure of executor was described along with decretalist doctrine.[3] The executor's function consisted in ensuring that the intention of the testator was followed; in the 12th and 13th centuries specifically, the executor was "basically the liquidator of the succession. All of the testator's goods, all his assets, all his debts, and not just those that are juridically demandable, but also debts of conscience, pass through his hands: he must pay the debts and legacies and receive monies owed. Among the legacies, paying out those that are *ad pias causas* continues to be the primordial function of the executor (...). The executor continues to be the *eleemosinarius*, charged with distributing alms to the churches and the poor."[4]

Starting in the 13th century, absent the testamentary designation of an executor, the bishop was charged with its execution. With respect to goods left for pious causes, Gregory IX ordered[5] the bishops to be the executors of those testaments, and required them to fulfill their obligation even if the deceased prohibited a bishop from intervening.[6] The bishop thus became the legal executor of testaments for pious causes with the function of substituting where there was no testamentary executor or, if there were an executor or executors, with the function of inspector. This innate and eminent role as executor was confirmed by the Tridentine Council (*sess.* XXII, ch. VIII and IX, *de reformatione*).

At the present time, the canonical legislator attributes the role of executor of pious causes not to the bishop but to the ordinary (cf. c. 134). The ordinary who is to execute the pious disposition will be the one with jurisdiction over the ecclesiastical entity benefiting from the act of disposition, regardless of the testator's place of death or the place where the goods being donated or willed are located. If the pious disposition benefits no existing entity, but instead consists precisely in giving life to a new one, the ordinary who will have jurisdiction over the new entity will be the executor.

3. Just as the bishop was in precodical law, the ordinary continues to be the eminent executor; that means that in addition to him, or rather under him, there will be the executor or executors named by the testator, referred to in § 2 as *ceteri exsecutores*. These other executors should not be considered only in the strict sense; that is, the heirs themselves may be considered to be executors of the pious disposition and so too, if named in the testament, may the testamentary executors. They are assigned by

2. Cf. A. NÚÑEZ IGLESIAS, *El testamento por comisario* (Madrid 1991), p. 67.
3. Cf. P. FEDELE, "Esecutore testamentario (Premessa storica)," in *Enciclopedia del Diritto* (Milan 1966), XV, p. 383.
4. A. NÚÑEZ IGLESIAS, *El testamento por comisario*, cit., p. 74.
5. X III, 26, 3.
6. Cf. A. BARROSO DE OLIVEIRA, *Vontades pías (Estudo histórico-canónico)* (Vila Real 1959), p. 99.

art. 902 of the Spanish Civil Code a broad role as overseers of the execution of all provisions in the testament.

4. Because the executor is named based on the confidence he enjoys with the testator, doctrine says that execution may not be delegated to any other person. But with reasonable cause the executor may refuse the charge. In any case, the duty carries no remuneration unless the testator has otherwise indicated.

5. The Code sets no term for executing the pious disposition. The executor should therefore perform his function within the period of time stipulated by the testator. If there is no time set in the testament for execution, it appears reasonable to accept the period of one year set in the Civil Code for civil testamentary executors. However, if the execution of a pious disposition does not consist of the usual and most frequent type, that is, the delivery of a simple legacy, but instead involves major complications, the ordinary may extend the testamentary period and the legal period of time. A pious disposition may occasionally consist of establishing an autonomous pious foundation, in which case "the executor must fulfill the testator's prescription as contained in the founding charter until the institute is established and being governed under its own organs, all under the oversight of the ordinary."[7] At other times, the disposition will consist in constituting a non-autonomous pious foundation; then the executor or executors will have to take appropriate action so that the juridical person to which the foundation should be adscribed may accept it, according to the will of the pious testator.[8]

6. Through his position as eminent or innate executor, the ordinary has the duty of urging execution of the pious disposition. Specifically, he should name an executor in case of the death of or refusal by the testamentary executor or executors. He should also name one if the testator has omitted to do so. He should also remove the executor or executors who, after being warned, persevere in negligence and fail to fulfill their function. The Code, however, contains no precept such as the provision in c. 2348 of *CIC*/1917 that, with regard to anyone in charge of a legacy or a donation to pious causes who was negligent in performing his duty, included the possibility of obligating him through censure. Therefore, absent any specific type of penalty, the principle of legality postulates that the threat of penalties is not a recourse. Nothing, however, precludes bringing action under civil jurisdiction (these actions are normally against the heirs) that would lead to fulfillment of the testator's dispositions on pious causes.

7. M. LÓPEZ ALARCÓN, "Legados píos," in *Nueva Enciclopedia Jurídica*, XIV (Barcelona 1986), p. 875.

8. Ibid.

7. In addition to the powers over the execution proper of a pious disposition that are mentioned above, § 2 expresses the ordinary's right and duty to oversee the fulfillment of pious dispositions, that is, after execution.

Vigilance will take place in cases where the fulfillment of a pious disposition is embodied in a foundation. With respect to the foundation, autonomous or not, visitation is prescribed to oversee fulfillment. This visit is different in basis and purpose from the visit in c. 396, but it may be performed simultaneously in the case of the bishop and, similarly, may be delegated. The visitation right is also extended to the so-called lay (or profane) pious causes to oversee the performance of pious charges.[9]

8. The duty to render accounts to the ordinary as provided in § 2 is also a consequence of the ordinary's position as eminent executor. There shall be a single rendering of accounts if the pious disposition is of the kind that may be completed in a single act (for example, delivering an amount of money for a scholarship for a seminary). But if it consists of anything lasting (successive deliveries from fruits or income), accounts should be rendered annually.

9. The testator may not relieve the executors of this duty to render accounts, nor impede the ordinary's right to visit, for § 3, prescribing that they are to be regarded as non-existent, precludes such clauses from having any effect. The basis of this norm lies in the fact that a private disposition cannot weaken a provision of public law.[10] There is special difficulty with the case in which the testator makes the effectiveness of the pious disposition itself depend upon the clause of non-intromission by the ordinary. There are various doctrinal opinions,[11] but the apparently better-founded ones maintain, as does García Berberena, that "if the originator ... links his consent to the validity of an unacceptable added clause that is contrary to the ordinary's rights, the action would be null and void by reason of the irremediable defect of consent."[12]

There is no reference in § 3 to the presence of this type of clause in pious dispositions *inter vivos*; so perhaps the final paragraph of c. 1302 § 1 could be applied analogically; that is, the executor should not accept a charge that, if carried out, would give rise to a lay pious cause.

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9. T. GARCÍA BARBERENA, "Las fuentes de derecho privado del patrimonio eclesiástico," in *Revista Española de Derecho canónico* 6 (1950), p. 110.
10. Cf. A. BARROSO DE OLIVEIRA, *Vontades pías*, cit., p. 114.
11. Ibid., p. 100.
12. T. GARCÍA BARBERENA, "Las fuentes de derecho privado del patrimonio eclesiástico," cit., p. 110.

1302 **§ 1. Qui bona ad pias causas sive per actum inter vivos sive ex testamento fiduciarie accepit, debet de sua fiducia Ordinarium certiorem reddere, eique omnia istiusmodi bona mobilia vel immobilia cum oneribus adiunctis indicare; quod si donator id expresse et omnino prohibuerit, fiduciam ne acceptet.**

§ 2. Ordinarius debet exigere ut bona fiduciaria in tuto collocentur, itemque vigilare pro exsecutione piae voluntatis ad normam can. 1301.

§ 3. Bonis fiduciariis alicui sodali instituti religiosi aut societatis vitae apostolicae commissis, si quidem bona sint attributa loco seu dioecesi eorumve incolis aut piis causis iuvandis, Ordinarius, de quo in §§ 1 et 2, est loci Ordinarius; secus est Superior maior in instituto clericali iuris pontificii et in clericalibus societatibus vitae apostolicae iuris pontificii, aut Ordinarius eiusdem sodalis proprius in aliis institutis religiosis.

§ 1. Anyone who receives goods in trust for pious causes, whether by an act *inter vivos* or by last will, must inform the Ordinary about the trust, as well as about the goods in question, both movable and immovable, and about any obligations attached to them. If the donor has expressly and totally forbidden this, the trust is not to be accepted.

§ 2. The Ordinary must demand that goods left in trust be safely preserved and, in accordance with Can. 1301, he must ensure that the pious disposition is executed.

§ 3. When goods given in trust to a member of a religious institute or society of apostolic life, are destined for a particular place or diocese or their inhabitants, or for pious causes, the Ordinary mentioned in §§ 1 and 2 is the local Ordinary. Otherwise, when the person is a member of a pontifical clerical institute or of a pontifical clerical society of apostolic life, it is the major Superior; when of other religious institutes, it is the member's proper Ordinary.

SOURCES: c. 1516 § 1

CROSS REFERENCES: c. 1299

COMMENTARY

José María Vázquez García-Peñuela

1. Canon 1302 is a specification of the preceding canon for pious dispositions in the form of fiduciary transactions; by virtue of his position as eminent and innate executor of all pious causes, the ordinary must be informed of any goods left in trust for these causes and should oversee the execution of them. The canonical legislator took interpository transactions into consideration because in some civil legislation, there are hindrances or obstacles (on many occasions deriving from the Enlightenment and an outdated mortmain view of pious causes) to the acquisition of goods by Church entities.

2. It is not accurate to reserve the content of this canon solely to trusts; rather, apart from transactions *inter vivos* (in particular, donations), in which there is a confidential charge, other types fall within its scope, such as "inheritances and legacies involving confidence, trust substitutions, English trusts and any other combinations that, based on the confidence of the testator in the other person, might be established for pious causes."[1]

The literal sense of § 1 refers to fiduciary agreements derived from acts *inter vivos*, not to those made generically *mortis causa*, but to such agreements acquired by testament. However, in practice, fiduciary agreements *ab intestato* are possible if the testator makes a confidential charge to the legitimate heir; and it does not appear that the legislator intended to exclude the possibility of pious dispositions through fiduciary agreements *ab intestato*. Just because they are not included, it cannot be deduced that they are prohibited.

3. The element that defines a fiduciary pious disposition is the presence of a confidential charge that a settlor (trustor) makes to a person (the trustee) to designate the goods that have been transmitted to him to pious causes. Thus the trustee is situated in juridical traffic as the titleholder of the goods, but this title is limited by the personal obligation entered into with the trustor. That means that the trustee acquires the goods not for himself, but for a third party. Thus a more correct translation of the verb *accipio* in § 1 might be "receive," which is its more proper meaning, rather than "acquire."

Even so, the trustee is the actual titleholder of the goods (not the apparent or simulated titleholder) until he transmits them to fulfill his charge. In actual fact, says Fuenmayor, "If a trustee transmits the goods to

1. M. LÓPEZ ALARCÓN, "Legados píos," in *Nueva Enciclopedia Jurídica*, XIV (Barcelona 1986), p. 868.

a third party, the transmission cannot be challenged; the trustor is left only with a personal action to force the trustee to indemnify him for failure to fulfill the personal obligation that is the content of the internal relationship."[2] Real ownership of the goods is what differentiates a trustee from an executor, who is never the titleholder. Furthermore, a trust always carries with it the power to administer the goods. In this regard, De Echevería points out that a charge to do something very specific, such as a simple delivery of an object, would not be considered fiduciary and therefore there would be no need to inform the ordinary.[3]

4. To a certain degree, *CIC*/1917 differs from earlier law in that it refers to the persons who may act as trustees.[4] López Alarcón notes that the Decretal *Tua nobis*[5] contained no restriction whatsoever with respect to laymen being trustees.[6] And immediately before the *CIC*/1917, there also were no doubts about the matter. It was so expressed in the SCCouncil in a response on August 7, 1909[7]: "omnes, sive sacerdotes sive laicos, quorum fidei concredita sunt legata ad pias causas, teneri de hoc quamprimum certiorem reddere episcopum, qui ius habet vigilandi super administrationem et cosulendi securitati eorumdem legatorum." However, c. 1516 provided for only the clergy and the religious as possible trustees. In the present c. 1302, on the other hand, there is no such limitation. Therefore anyone with sufficient business capacity may act as trustee, not excluding juridical persons, both ecclesiastical and civil.

5. In § 1 the trustee is given the duty to inform the ordinary of the confidential charge received. Nothing is said about the manner or time in which it should be done. With respect to the manner, it appears that there is nothing to prevent an oral report. However, the written form is more consistent with the prescription to render an account of all goods, movable and immovable, and if applicable, of the encumbrances thereon; it is nothing other than an inventory. With respect to a time limit, the text of the Code sets no deadline; but it must be taken into account that c. 1300 mandates that pious dispositions be fulfilled *diligentissime*, which implies that the legislator is imposing the duty of promptness for anything pertaining to the matter. It follows that in keeping with the spirit of both canons, it can be said that the ordinary should be informed as soon as possible.

2. A. DE FUENMAYOR, "Problemas que plantean los cánones 1.499 § 1 y 1.513 desde el punto de vista civil," in *Revista Española de Derecho canónico* 6 (1950), p. 438.

3. Cf. L. DE ECHEVERRÍA, "Fundaciones piadosas," in *El Derecho patrimonial canónico en España* (Salamanca 1985), p. 108.

4. Cf. A. BARROSO DE OLIVEIRA, *Vontades pías (Estudo histórico-canónico)* (Vila Real 1959), p. 126.

5. X III, 26, 17.

6. M. LÓPEZ ALARCÓN, "Legados píos," cit., p. 869.

7. *AAS* 1 (1909), p. 766.

Contrary to the clauses that relate to the ordinary's right to oversee in executing pious dispositions, clauses that are to be regarded as nonexistent (see commentary for c. 1300), and clauses contrary to the trustee's duty to inform about the trust received and to render account of the goods and his charges, if put in place by the trustor, have the effect, in accordance with § 1, that the trustee should not accept the trust. In practice, if the trust was made in an act *inter vivos*, considering the good of the Church, it will be normal to try to convince the testator to withdraw the prohibition; but if he does not do so, it must not be accepted. It may happen in either a trust *inter vivos* or a trust *mortis causa* that the trustee, for whatever reason (for example ignorance or inadvertence), does in fact accept it. In that case, considering the provisions in c. 6, the acceptance is valid. This is because the canon does not carry with it an express sanction of the invalidity of the act, as is the case of accepting a foundation without the prior written permission of the ordinary in c. 1304, which is an analogous assumption. The ignorance of the ordinary's intervening function determines, by the wish of the legislator, that the act is null and void.

6. The right and duty to oversee that c. 1301 attributes to the ordinary in the execution of pious dispositions is extended by § 2 to pious dispositions contained in a trust. Like executors, a trustee must render account of his actions. The requirement that the delivered goods be safely placed must be understood with respect to movable goods. Placement must be understood as not only custody of valuables such as jewels or works of art in a suitable place, but also "the conversion of money into other productive goods, not only immovables, but also movables, such as stocks and bonds of an industrial company or government obligations."[8] Changing the placement logically requires the intervention of the ordinary.

7. Finally, § 3 contains certain criteria on the distribution of competences among the ordinaries in relation to testamentary trusts. The general principal to be drawn from this is that the empowered ordinary is not the trustee's ordinary but the ordinary with jurisdiction over the pious cause benefiting from the trust, or that will benefit if the trust contains a charge to establish an entity. Paragraph 3 refers only to cases where the trustee has a specific subjective juridical status: status as a member of an institute of consecrated life. That status that will not preclude his having to give an account of the trust to the local ordinary and not to the ordinary of his institute if the purpose of the trust is to benefit the diocese, its inhabitants or entities. Consistent with that, although the trustee may be a layperson or a secular cleric, if the fiduciary pious disposition is designated to an institute of consecrated life, the duty to inform should refer to the superiors of the institute.

8. A. BARROSO DE OLIVEIRA, *Vontades pías*, cit., p. 128.

8. Generally, civil legislation of a state looks with a certain suspicion upon trust transactions. In Spanish civil law, the admissibility of trust transactions *inter vivos*, as pointed out by Fuenmayor, who studied the matter in detail, causes no problem. "Doctrine and case law both accept the validity of fiduciary transactions *inter vivos* provided, naturally, that they involve no fraudulent evasion of laws, and this is not seen in dispositions for pious causes."[9]

More problematical are fiduciary dispositions *mortis causa* in the light of certain precepts in civil codes. The Spanish Civil Code evidently prohibits the possibility of a trust made to an heir or legatee; art. 785, § 4, prohibits a disposition "the purpose of which is to leave a person all or part of the inheritance to be applied or invested according to private instructions the testator may have communicated to that person." One author maintained that a canonical trust is not affected by the limitations that prohibit certain types of trust because "in reality, this is not a modern-type trust substitution, but a true trust of the Roman type,"[10] in which the trustee would act more as an executor than as a true titleholder. According to Fuenmayor, however, this is not a direct consequence of the transcribed precept, but rather is due to the effect of different general norms in the Spanish system of succession (arts. 670, 672 and 687): "All the features of testamentary trusts are invalid under civil law due to the element of confidentiality that is always involved in them or to the post mortem mandate they sometimes contain."[11]

The only loophole to be found in the Spanish Civil Code, where trusts for pious causes might fit, is in art. 671: "The testator may commend to a third party the distribution of sums that he is leaving generally to certain groups of people, such as relatives, parents, charitable establishments, and also the choice of persons or establishments to whom the sums are to be applied." Nevertheless, from a practical point of view, in the light of the broad recognition of the juridical personality of ecclesiastical entities and their capacity to acquire goods found in the current Spanish system of concordats, the concept of the testamentary trust to leave goods to pious causes is not advisable due to the problems that may arise in the civil jurisdiction.

9. A. DE FUENMAYOR, "Problemas...," cit., p. 439.

10. J. MALDONADO AND FERNÁNDEZ DEL TORCO, "Las causas pías ante el Derecho civil," in *Revista Española de Derecho canónico* 6 (1950), p. 462.

11. A. DE FUENMAYOR, "Problemas...," cit., p. 441.

1303 **§ 1. Nomine piarum fundationum in iure veniunt:**

1° piae fundationes autonomae, scilicet universitates rerum ad fines de quibus in can. 114, § 2 destinatae et a competenti auctoritate ecclesiastica in personam iuridicam erectae;

2° piae fundationes non autonomae, scilicet bona temporalia alicui personae iuridicae publicae quoquo modo data cum onere in diuturnum tempus, iure particulari determinandum, ex reditibus annuis Missas celebrandi aliasque praefinitas functiones ecclesiasticas peragendi, aut fines de quibus in can. 114, § 2 aliter persequendi.

§ 2. Bona piae fundationis non autonomae, si concredita fuerint personae iuridicae Episcopo dioecesano subiectae, expleto tempore, ad institutum de quo in can. 1274, § 1, destinari debent, nisi alia fuerit fundatoris voluntas expresse manifestata; secus ipsi personae iuridicae cedunt.

§ 1. In law the term pious foundation comprises:

1° autonomous pious foundations, that is, aggregates of things destined for the purposes described in Can. 114 § 2, and established as juridical persons by the competent ecclesiastical authority;

2° non-autonomous pious foundations, that is, temporal goods given in any way to a public juridical person and carrying with them a long-term obligation, such period to be determined by particular law. The obligation is for the juridical person, from the annual income, to celebrate Masses, or to perform other determined ecclesiastical functions, or in some other way to fulfil the purposes mentioned in Can. 114 § 2.

§ 2. If the goods of a non-autonomous pious foundation are entrusted to a juridical person subject to the diocesan bishop, they are, on the expiry of the time, to be sent to the fund mentioned in Can. 1274 § 1, unless some other intention was expressly manifested by the donor. Otherwise, the goods fall to the juridical person itself.

SOURCES: § 1: c. 1544 § 1

CROSS REFERENCES: cc. 114–123, 1257

COMMENTARY

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1. *Introduction*

In spite of the undeniable contribution of canonical knowledge to the preparation and decanting of the juridical figure of the foundation, in the Code there is no general and systematic regulation of foundations. There are, of course, many fewer norms on foundations than norms directed towards ordering associations. They are distributed among various canons in book I and, above all and principally, in c. 1303, that we are now commenting on, and the canons that follow it in this title.

In canon law, foundations are the archetypal pious causes and they have taken on, as they still do, a greater importance. The idea of dedicating goods to a pious or charitable purpose is fully realized in foundations. In addition, the permanent or lasting designation of a patrimony to a purpose is the nucleus that shapes the canonical foundation more that the fact that the patrimony acquires juridical personality because, in fact, all foundations do not require being invested with juridical personality. However, in current regulation that is where the fundamental distinction in the matter lies. Canon 1303 distinguishes foundations with personality, which it calls autonomous, and those without personality, which it calls non-autonomous. This is one of the principal novelties introduced by the legislator in relation to the discipline of the *CIC*/1917, in which the pious foundation (that is likened to a synallagmatic contract of the *do ut facias* type) never became a juridical person (see introduction to title IV).

From a general point of view, foundations arise in juridical law, considered in its dynamic sense, by a an act of intention on the part of a subject of the law who, of his own free will, separates out a part of his patrimony so that, with these goods and according to the way he determines, purposes that he also determines may be accomplished. There are, then, three elements essential to a foundation. First, an aggregate of goods. Without them, the term foundation cannot be properly used, although the fact they are essential should not lead one to think, by a process of reduction (in the same way that any group of persons does not constitute an association), that a foundation is merely a *universitas rerum*. The reason is that the goods must have a certain purpose—they must be "finalized." That is, by the intention of the founder, they are in the service of or the instrument for achieving an objective, which is the second element of a foundation. The third is the way in which the goods are disposed of (invested, managed, administered, etc.) so that the purpose may actually be achieved instrumentally through them. Said in other words, the third element consists of organization.

In canon law the third element varies substantially depending on whether the pious foundation is autonomous or non-autonomous. If it is autonomous, the founder himself establishes the organization, normally in the foundational act of the will. That is always the case because the organization is established ex novo and is supported by the device of juridically personifying the foundation. In the case of non-autonomous foundations, on the other hand, the foundation utilizes the organization of a pre-existing juridical person to achieve the purposes established by the founder.

In contrast to a number of civil regulations, an important characteristic of canon law on foundations is the need in either type of foundation for intervention by an authority before such a foundation can come into existence. As will be explained later, autonomous pious foundations will exist only if erected by authority. With regard to non-autonomous pious foundations, intervention by authority takes the form of the prior permission for acceptance of the foundation by the juridical person designated to receive the goods; without permission, acceptance is null and void. Therefore, following the general capacity of the faithful, contained in c. 1299, to leave their own goods to pious causes, there is no unconditional subjective right of foundation by which juridical life may be given to any entity (with or without personality and based on patrimony) by simply determining autonomy of intention. But, as has been said, intervention by ecclesiastical authority is a condition *sine qua non* because of its constitutive nature.

This intervention consists of control exercised basically over two aspects: the possibility and the ecclesiasticality of the foundation. The authority should verify that it will be possible for the foundation to achieve the objectives proposed by the founder with the patrimonial endowment he has made. And control of ecclesiasticality occurs upon examining whether the objective or objectives proposed are consistent with the Church's mission. More concretely, it must be determined if they fit into the general purposes that the legislator, in view of the mission, assigns to ecclesiastical juridical persons in c. 114.

Although it is present in one form or another in civil codes under Napoleonic influence, such as the Spanish Civil Code, there is no requirement in the Code that foundations have general-interest purposes, a requirement that is one way to prevent the impossibility of binding goods exclusively in favor of certain persons.[1] For that reason, keeping to the purposes of c. 114, naturally, there is nothing to prevent a foundation from having its purpose benefit certain persons, such as the faithful of a specific area or the members of a religious institute.

1. Cf. F. DE CASTRO AND BRAVO, "La pretendida validez de las fundaciones familiares," in *Anuario de Derecho civil* 6 (1953), pp. 623–651.

2. *Autonomous pious foundations*

a) Constitution

A foundation may be given life by any person with sufficient capacity to act so as to dispose of his/her goods gratuitously (see commentary on c. 1299). Physical persons and juridical persons may both be founders. Ecclesiastical (public or private) entities and civil ones may all be founders of juridical persons. Physical persons may act as individuals (which is the most common) or as a group. If as a group, the foundation must be by an act *inter vivos*, given the very personal nature of making a will.

The act of founding basically consists of a declaration of intention that is non-receptitious in nature and by which a patrimony is adscribed to achieve certain ends. Civil law doctrine discusses whether in the origin of the foundation there are one or more juridical acts, since some authors distinguish at least between the foundational act proper and the patrimonial endowment. However, it appears more correct to speak of a single but complex act[2] since the original allocation of goods is consubstantial with the idea of foundation. With greater reason, this idea should be maintained in canon law, which does not provide for the possibility of a successive foundation, inasmuch as self-sufficiency of the patrimony is necessary for erection, and therefore, for the acquisition of juridical personality.

The declaration of intention originating a foundation may be made by an act *inter vivos* or by an act *mortis causa*. In the first form, the foundational intention, so to speak, if it is valid, is dissociated from the person issuing it and becomes irrevocable, but in the second case it remains latent in the subject's sphere of juridical action for he may revoke it up until the time of his death.

A foundational patrimony "may be composed of goods and rights of any kind. However, considering that the finality of the patrimony is that it is permanently bound to obtaining certain pious ends, the greater part of the goods must not be consumed but remain and produce fruits or income. Goods designated directly to foundational purposes (building, libraries, etc.) and goods invested 'prudently and usefully in benefit of the foundation' (c. 1305) that is, goods that produce income serving those purposes and denominated fruitful goods, are all to be considered as endowment goods."[3]

In addition to indicating which goods are to be segregated from the patrimony proper to endow the foundation and the purposes to which it is directed, a declaration of foundational intention should also include the kind of organization that it is desired to give to the designated patrimony.

2. Cf. I. NART, "La Fundación," in *Revista de Derecho privado* 35 (1951), p. 495.
3. J. TRASERRA CUNILLERA, *Las Fundaciones Pías Autónomas* (Barcelona 1985), pp. 27 and 28.

Normally this organization will be embodied in the foundation's statutes, which constitute the immediate norm that gives it legal form. On occasion it may happen that the founder gives no more than generic indications about his intention with regard to the form in which the foundation should be organized. There is nothing to prevent another person or other persons from giving concrete form to the intention (for example, the executor or the actual heirs), who may be charged with drawing up the statutes.

At the time of regulating the principal aspects of the life of the foundation, logically the statutes must take into account and follow the imperative prescriptions of public law on the matter, for example, laws pertaining to intervention by ecclesiastical authority.

In addition to this title, dedicated to pious dispositions, the Code establishes a control over the legality of statutes in c. 117 when it requires they be approved prior to attaining juridical personality. This requisite applies to associations and foundations. Approval is an administrative act that should totally respect the foundational intention. For example, it may not, for opportune reasons, introduce modification into its norms, but must, if applicable, indicate which statutory norms are illegal and in what way.

But the fundamental intervention of the ecclesiastical authority occurs with an act different from the act of approval, although in practice, they may be simultaneous. This is the act of erection by which the designated and organized patrimony acquires juridical personality. The act of erection is constitutive in nature; without it, it is impossible to acquire juridical personality. However, it cannot be maintained that erection gives juridical life to something that was completely non-existent. As soon as foundational intention is declared, an autonomous juridical entity exists (that, for example takes for itself the fruits and income from its goods). As Condorelli maintains, what happens is that it specifically does not enjoy ecclesiasticality until it is erected.[4]

In accordance with § 1, erection is a duty of "the competent ecclesiastical authority." According to Traserra, "general and episcopal vicars also, insofar as they hold ordinary executive power (c. 134 § 1), and including those who have obtained delegation of ordinary executive power (c. 137),"[5] should be included in this expression, although he believes that for practical reasons it would have better to reserve the matter for the diocesan bishop.

Erection must be granted or denied by a decree that according to c. 57 should be issued within three months of reception by the authority of the petition to erect the foundation. This administrative resolution should

4. M. CONDORELLI, *Destinazione di patrimoni e soggettività giuridica nel Diritto canonico. Contributo allo studio degli enti non personificati* (Milan 1964), p. 152.

5. J. TRASERRA CUNILLERA, *Las Fundaciones Pías Autónomas*, cit., p. 40.

be justified, especially if the petition is denied. There are certain reasons prescribed in § 3 of c. 114 that justify denying erection (lack of usefulness of the purpose being pursued and insufficiency of means). Outside of these, denial of erection may not be based on any other reasons. Logically, at the time of evaluating whether there are reasons for erection or denial, the authority enjoys discretionary power.

Under the terms of cc. 1732–1739, a hierarchical recourse must be sought against a decree of denial of erection as a juridical person. If denial was ordered by a diocesan bishop, recourse must be sought before the competent dicastery, which is the Congregation for the Clergy. If the settlement is negative, a contentious-administrative suit may be brought.

Although Molano stated that in the present Code the term erection is reserved exclusively for public juridical persons,[6] in c. 1303 the term *erectae* does not mean that all pious foundations are born as public persons. Rather, the opposite should be considered the norm. The distinction between public and private foundations depends, in the final analysis, upon the will of the ecclesiastical authority incorporated into the decree of erection. The decree must evaluate not only whether the ends should be written directly in the ends directly pursuable with special interest by the hierarchy (such as, for example, allocating resources for the formation of seminarians), but whether the very organization of the foundation is, so to speak, susceptible of being integrated into the institutional fabric of the Church.

In the patrimonial area, the most import consequence to be derived from the fact that a foundation is erected as a public person is that, under c. 1257, its goods have ecclesiastical status. Therefore the primary norm for governing it will not be the statutes, but the precepts in titles I–III. In the light of this fundamental difference, it should be held that the founder may express his intention in the foundational instrument that the foundation should remain a private person.

b) Governance

The basic norm regulating the life of the foundation is its statutes which, as already said, should respect the norms of *ius cogens*. Among the required content of the statutes,[7] there is the one pertaining to the person or persons whose function it is to direct the life of the foundation so it may achieve the ends for which it was constituted and who are called patrons. The founder should designate the patrons or indicate the way in which they should be designated. The statutes should provide for their reappointment and the manner in which they should make decisions when there is more than one patron. In the absence of such a provision, the norms on the formation of intention for colleges in c. 119 shall apply.

6. Cf. E. MOLANO, commentary on c. 114, in *Pamplona Com.*
7. Cf. J. TRASERRA CUNILLERA, *Las Fundaciones Pías Autónomas*, cit., pp. 46 ff.

There is nothing to prevent the patron or board of patrons from consisting of an already existing corporation (for example, a cathedral chapter). "Note, however, that entrusting governance to a corporation does not assume that the foundation in not autonomous; the foundation is autonomous and perpetual, but lacks its own governing organs and governance is entrusted to the corporation."[8]

The board of patrons represents the foundation both in procedures and otherwise. Its principal mission is to manage the foundational patrimony so that through it the foundation's purposes may be achieved. Depending on whether the foundation is a person of public or private nature, management shall be more or less carried out by the ecclesiastical authority. The ordinary should oversee compliance with the pious dispositions and may do so by visits, including to private foundations. In a visit, for the function of oversight to be really effective, he may ask to be shown the foundation's account books to verify the degree to which the endowment income is effectively allotted to its purposes. However, unless so provided in the statutes, there is no obligation to render annual account books with regard to private foundations. On the other hand, public foundations, in addition to what the statutes may contain, should keep to the norms of the Code on administration and alienation of ecclesiastical goods. Some authors extend the need for permission from the ordinary for the valid alienation of goods to private foundations.[9] But considering § 2 of c. 1257, because they are not ecclesiastical, the goods of private foundations may be alienated without said permission.

c) Extinction

Nothing is said in c. 1303 about the extinction of autonomous pious foundations. They must be governed by the content of c. 120, which presents the causes for extinction of juridical persons in general after stating the principle that every juridical person is perpetual by nature. This is especially applicable to the foundations that precisely come into juridical life with that note of perpetuity, because with their constitution the aim is to pursue a purpose that is considered to be unattainable in the lifetime of an individual. The concrete consequence of the characteristic of perpetuity is not so much, logically, that foundations are inextinguishable, but that their duration cannot be subject to a limitation in the statutes.

For the extinguishing juridical persons, there are in c. 120 what could be called formal reasons which always lead to an act of suppression by the authority (except for inactivity for more than one hundred years, which automatically generates extinction). The same recourses may be

8. L. DE ECHEVERRÍA, "Fundaciones piadosas," in *El Derecho patrimonial canónico en España* (Salamanca 1985), p. 113.
9. Cf. J. TRASERRA CUNILLERA, *Las Fundaciones Pías Autónomas*, cit., pp. 68 ff.

used against an act of suppression as against a decree denying erection of the foundation.

But from a material point of view, the reasons for the extinction of an autonomous pious foundation are those that make it impossible to achieve the ends that are the foundation's *raison d'être*. To summarize, these reasons are: a) that the purposes have already been fulfilled, that is, the foundation is extinguished because it has fulfilled its objectives; b) that the purposes become pointless due to a change in circumstances brought about with the passage of time; and c) as most frequently occurs, that the foundation is inactive due to destruction or loss of value of the endowed goods.

Some authors deem that if foundational activity becomes harmful to ecclesial life, the authority may suppress it,[10] occasionally on the basis of analogy with § 1 of c. 326.[11] Without entering into a discussion of this possibility and taking into account that such harm will be imputable less to the *universitas rerum* considered in itself and more to the persons who govern it, since he who can do the most can do the least, it seems that the most adequate measure would be the removal of the patrons.

Finally, the goods of the extinct foundation should be designated in accordance with c. 123, that provides that in the case of private foundations, the planned designation should be taken care of by statute. If there is no provision of this sort, it would be more in accord with the principle of respect for the founder's will to designate them to those public or private institutions whose purposes are closest to the those of the extinguished foundation.

3. *Non-autonomous pious foundations*

Certain fundamental aspects of the second type of foundation are regulated in § 1,2°. Foundations of this type are usually called fiduciaries in the doctrine, but current regulation should give up this name in favor of the legal and more correct name of non-autonomous foundations. With this expression the legislator has meant to show that the foundation's goods are not erected in a juridical person. In any case the patrimony does not totally lose its autonomy[12] since it is designated *en bloc* to a purpose. It is therefore not merged with the patrimony of the juridical person who endows it with organization. Perhaps it would have been better to call them non-personified foundations.

10. Ibid., p. 74.
11. L. DE ECHEVERRÍA, "Fundaciones piadosas," cit., p. 114.
12. M. CONDORELLI, *Destinazione di patrimoni...*, cit., *passim*.

A non-autonomous pious foundation consists of a set of temporal goods (they may be movable or immovable) given to an ecclesiastical public juridical person and validly accepted, with their charges, by that person (see commentary on c. 1304). The expression *quoquo modo* in the canon appears to be there to express the idea that the goods may be given by a transaction *inter vivos* or by an act *mortis causa*.

The literal meaning of the text makes a division between the non-autonomous foundations that are established with a worship charge (that is actually their proper purpose), such as celebrating Masses and certain other ecclesiastical functions, and non-autonomous foundations that may have any other purpose among those listed in c. 114 § 2. According to a literal interpretation of the precept, the only difference separating them lies in the fact that with respect to non-autonomous foundations involved in worship, which includes traditional memorial and anniversary Masses, it is said that the charges will be paid for from the annual income. However, this does not appear to authorize a public juridical person upon which a foundation of other purposes depends to liquidate foundation capital in whole or in part to pay the expenses of or achieve the foundation's purposes.

The act of foundational disposition does not necessarily consist only in the act of disposing of the goods but, although it is not possible to speak properly of the statutes, it may be extended to the method by which the purposes are to be fulfilled, a question that should be evaluated prior to acceptance.

Doctrine has shown that there is an important difference from the *CIC*/1917 regulation in that non-autonomous foundations may no longer be constituted in perpetuity, but their duration will be for a long period of time. The commentators on the *CIC*/1917 did not reach a common position over what would be the minimum period of time for a pious foundation to have the character of diuturnity.[13] The universal legislator remitted the setting of the time period to particular law.

The General Decree of the CBS on "certain special questions in financial matters," approved by the XLI Plenary Assembly[14] and in force since August 25, 1985, establishes in art. V that "Current c. 1303 § 2 may be applied to non-autonomous foundations that have been in existence for more than fifty years and that have been constituted according to the norms of *CIC*/1917." From that it may be deduced that a term of fifty years is a reasonable maximum duration. It is another question how far this provision is respectful of foundations that were created under *CIC*/1917 and that have undeniably acquired rights in perpetuity. [15] The contents of § 3

13. Cf. F. AZNAR GIL, *La administración de los bienes temporales de la Iglesia. Legislación universal y particular española* (Salamanca 1984), pp. 148–149.
14. *BOCEE* 6 (1985), pp. 66–69.
15. Cf. A. LAURO, "La Congregazione per il Clero," in *La Curia Romana nella Cost. Ap. "Pastor Bonus"* (Vatican City 1990), p. 340.

are provisions on the destination of goods after the foundation has endured for a long period of time. It should be interpreted in the sense that also in this case the will of the founder should prevail, regardless of the type of juridical person to which the foundation is adscribed. Therefore, if an intention is expressed with regard to the destination of the goods, then it must be followed. In the absence of such an expression, the *CIC* distinguishes between whether the juridical person to whom the goods were given is subject to the diocesan bishop or not. If so, the goods must be designated to the institute for support of the clergy. If not, they become a part of the patrimony of the juridical person upon whom the foundation depended.

This precept, if carefully observed, would cause the current situation where without the required details, positions that make non-autonomous pious foundations similar to donations or legacies *sub modo* cannot be admitted. This is true to the extent that it might very well happen that a public juridical person to whom the goods were given, if the testator so disposes or if he is subject to the diocesan bishop, never succeeds in taking ownership of the goods. It is perhaps for that reason, among others, that the legislator omits the reference contained in the old c. 1544 that after acceptance a pious foundation acquires the nature of a synallagmatic contract of the type do ut facias.

4. *Civil recognition of pious foundations*

The Agreement between the government of Spain and the Holy See on Juridical Affairs of January 3,1979, regulates recognition of the civil juridical personality of ecclesiastical foundations (understood to mean the autonomous foundations, although that codical distinction did not exist when the agreement was drawn up). This agreement distinguishes between: a) foundations that already had recognized civil personality and full power to operate; b) others that at that time, although erected, did not enjoy civil personality; and c) those that might be erected in the future.

Regarding the first type, the First Temporary Provision says that "They should be entered in the appropriate State Register as soon as possible" and adds that "After three years from the time this Agreement becomes effective in Spain, they may confirm their juridical personality only by certification of said registration, without prejudice to being able to register at any time." From this it can be inferred that foundations that enjoy civil personality will continue to have it without interruption and that inscription in the register is not constitutive, but only *ad probationem*.

With regard to the second type, paragraph 4 of art. I of the Agreement establishes that "They may acquire civil juridical personality subject to the provisions of the law of the country, through inscription in the appropriate register by virtue of the authentic document in which are

recorded the erection, purposes, identifying data, representative organs, functioning governing organization and the powers of said organs."

The expression "subject to the provisions of the law of the country" should be understood with qualifications. In any case, special legislation and not the ordinary law applicable to all foundations will be applicable to ecclesiastical foundations.[16]

In addition, art. V of the Agreement is applicable to ecclesiastical foundations that are beneficial by nature or for welfare. Said article establishes that "they shall be governed by their statutory norms and shall enjoy the same rights and benefits as entities classified as for private benefit."

The entity referred to by the Agreement is the Register of Religious Entities, dependent upon the Ministry of Justice, the organization and functioning of which was regulated by Royal Decree 142/81 of January 9th. Inscription in the Registry of religious foundations of the Catholic Church was regulated by Royal Decree 589/1984 of February 8th. To register therein, the following documents must be submitted: a certification of religious purposes issued or authorized by the Secretary of the bishops conference and the deed of foundation in which are included the decree of erection and other data, rather extensive, required by said administrative provision.

16. J. FORNÉS, "La personalidad civil de los entes de las confesiones," in *Diritti, persona e vita sociale. Scritti in memoria di Orio Giacchi* (Milan 1984), p. 297.

1304 **§ 1. Ut fundatio a persona iuridica valide acceptari possit, requiritur licentia Ordinarii in scriptis data; qui eam ne praebeat, antequam legitime compererit personam iuridicam tum novo oneri suscipiendo, tum iam susceptis satisfacere posse; maximeque caveat ut reditus omnino respondeant oneribus adiunctis, secundum cuiusque loci vel regionis morem.**

§ 2. Ulteriores condiciones ad constitutionem et acceptationem fundationum quod attinet, iure particulari definiantur.

§ 1. For the valid acceptance of a pious foundation by a juridical person, the written permission of the Ordinary is required. He is not to give this permission until he has lawfully established that the juridical person can satisfy not only the new obligations to be undertaken, but also any already undertaken. The Ordinary is to take special care that the revenue fully corresponds to the obligations laid down, taking into account the customs of the region or place.

§ 2. Other conditions for the establishment or acceptance of a pious foundation are to be determined by particular law.

SOURCES: § 1: c. 1546
§ 2: c. 1545

CROSS REFERENCES: c. 114 § 3

COMMENTARY

José María Vázquez García-Peñuela

1. The first paragraph of this canon refers to non-autonomous foundations, which are the foundations that need the procedure of acceptance. Without the acceptance of the juridical person (in this case the canon does not add the qualifier of public, but it should be so), the foundation is not constituted. That means, the mere will of the testator is not sufficient for establishing a non-autonomous pious foundation. Acceptance is of the foundation itself and taken as a whole, not only of the goods. A more or less onerous donation or legacy is not acceptable, because in theory it will not be the case that in every foundation after its time has run, the public juridical person to which it is adscribed will take over the goods that have been left (see commentary on c. 1303).

The Code says nothing about the time and manner in which acceptance shall take place. With respect to time, the general duty of diligence must be respected, as impressed by the legislator on the matter of fulfilling pious dispositions; therefore, acceptance must take place as soon as possible and without delay. With regard to the manner, the words suggest an interpretation analogous with c. 1306.

The juridical person is not obligated to accept the foundation even if it is qualified to do so, because it may happen that the purposes to which the founder wished to dedicate the goods may not be consistent with the purposes of the juridical person. Now, since there is at least the expectation of the Church acquiring the goods intended for the foundation, it is reasonable to think that a non-autonomous foundation should not be rejected without consulting the ordinary about it, since such a rejection could result in harming the ecclesiastical patrimony.

It is, however, expressly provided that the ordinary intervene if the juridical person is willing to accept the foundation. Specifically, permission is required before acceptance. Contrary to what happened under the Pio-Benedictine regulation, where nothing was said, and therefore doctrine and jurisprudence agreed that it was required only for the sake of legality,[1] now permission for acceptance is required *ad validitatem*. Permission should be denied if it is not clear, in the light of the obligations already held by the juridical person, that it can adequately fulfill the new obligations that the foundation involves, taking into account local or regional customs. However, if the income is insufficient, there is nothing to prevent the ordinary from first proceeding to reduce the obligations according to cc. 1308–1310, and then granting permission.

Permission should be requested in writing by the representatives of the juridical person to whom it is wished to adscribe the non-autonomous foundation. In the request, all goods shall be inventoried, listing the income they will presumably produce, and all encumbrances shall be mentioned, the obligations derived from foundations that were previously accepted and, if applicable, when they will cease. Permission shall be issued in writing and the reasons at least briefly explained. This is an administrative act that is authorizing in nature. There is therefore hierarchical recourse available, after which contentious-administrative litigation may be pursued.

It may happen in some non-autonomous foundations that there is some aspect relating to the obligations that the founder did not specify. Such a determination after the act of disposition but necessarily previous to acceptance falls to the ordinary by virtue of his position as inherent executor of all pious dispositions (c. 1301). Thus, if the founder should leave money or goods for celebrating Masses without specifying how many or

1. Cf. R. NAZ, "Fondations pieuses," in *Dictionnaire de droit canonique*, V, col. 866.

how often, this detail should be specified by the ordinary. Similarly, if it is the will of the founder to apply the goods to more than one destination (for example, for celebrating masses and for welfare or beneficent activities) and the proportion has not been specified, the decision also falls to the ordinary.[2]

If the income is sufficient to cover the obligations but the public juridical person cannot accept the non-autonomous foundation due to the obligations already encumbering it, it makes a difference whether the disposition of goods is *inter vivos* or *mortis causa*. In the first case, the founder may either give them to another institution or revoke the gift. In the second, c. 1309 on the transfer of obligations will be applied.

2. When § 2 remits the determination of more specific conditions on the constitution and acceptance of foundations to particular law, it is also referring to autonomous pious foundations. In the norms given by the CBS, except for the provision in arts. 10 and 13 of the II° General Decree on supplementary norms to the new *CIC*,[3] stating that the diocesan fund for support of clergy is to be constituted as a public autonomous pious foundation, there is no norm on the constitution or acceptance of foundations.

2. Cf. G. VROMANT, *De bonis ecclesiae temporalibus* (Paris 1953), p. 303.
3. *BOCEE* 6 (1985), pp. 59–65.

1305 **Pecunia et bona mobilia, dotationis nomine assignata, statim in loco tuto ab Ordinario approbando deponantur eum in finem, ut eadem pecunia vel bonorum mobilium pretium custodiantur et quam primum caute et utiliter secundum prudens eiusdem Ordinarii iudicium, auditis et iis quorum interest et proprio a rebus oeconomicis consilio, collocentur in commodum eiusdem fundationis cum expressa et individua mentione oneris.**

Money and movable goods which are assigned as an endowment are immediately to be put in a safe place approved by the Ordinary, so that the money or the value of the movable goods is safeguarded; as soon as possible, they are to be carefully and profitably invested for the good of the foundation, with an express and individual mention of the obligation undertaken, in accordance with the prudent judgement of the Ordinary when he has consulted those concerned and his own finance committee.

SOURCES: c. 1547

CROSS REFERENCES: cc. 1283 § 2,6°, 1300

COMMENTARY

José María Vázquez García-Peñuela

1. The *raison d'être* of the precept lies in the need to protect the nascent foundation from the very beginning and to safeguard adequately its patrimony. The canon distinguishes two phases with respect to the action to be taken about the goods: one immediately, or depositing of the goods and the other thereafter, or placement of the goods. Both refer to the monies or movable goods of the endowment, which is logical given how easy it is to lose or misplace it.

a) Movable goods and money must be deposited in a safe place. It may be assumed that the deposit may be made even before acceptance in the case of non-autonomous pious foundations if the juridical person designated by the founder has taken temporary legal possession (for example, after voluntary delivery by the heirs). Contrary to c. 1547 of *CIC*/1917, which provided that a safe place was to be designated by the ordinary, c. 1305 says merely that it must be approved. Therefore it is the public juridical person or the persons designated as patrons, depending on whether the foundation is autonomous or not, who should propose a safe place.

b) The second phase refers to prudent and productive placement, or investment, of the money or the price of the movable goods. By mentioning the price of movable goods the legislator appears to indicate that they must be sold. However, as López-Alarcón says, "Sound administration may call for movable goods not to be sold immediately or rashly (except in the case of those that are not profitable), such as securities or useful commercial goods or others, which produce greater profits than would derive from their sale."[1] On the other hand, adds López-Alarcón, "any agricultural, commercial or industrial enterprises that might form part of the capital of the foundation, the profits of which have been earmarked by the founder for the fulfillment of pious obligations are not considered movable goods, and therefore neither the company as such, nor its constitutive elements of which it is composed should be sold. On the contrary, it should continue in use, even though only by lease or some other profitable type of transfer, which does not prevent steps from being taken to enhance its profitability."[2]

2. General norms cannot be established about which types of investment of endowments are the best. The legislator refrains from doing so because it depends on the ever-changing circumstances of the economy. Naturally, there is no longer any type of prescription, such as those in precodical law,[3] favoring real estate investment. The decision on the type of investment falls to the ordinary, but he should take into account the fact that in pious dispositions, the foundational intention should be respected "even in the manner of the administration and the expending of the goods" (c. 1300). Any subsequent modification it is desirable to introduce concerning the manner of investing the goods shall also be approved by the ordinary.

3. The canon mandates that the ordinary, before deciding upon the investment of the endowment, hear his finance committee and the interested parties. He is not bound by either opinion. The interested parties in the investment of the endowment are, as a minimum, the public juridical person to whom the non-autonomous foundation is adscribed, the patrons if it is an autonomous foundation and the founder himself or his successors. The ordinary may, furthermore, issue general norms concerning such aspects as custody of the shares, bonds, certificates of deposit, etc., if the investments are in this type of securities,[4] or norms concerning the requirement of joint action for carrying out certain operations such as the withdrawal of bank funds.

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1. M. LÓPEZ ALARCÓN, commentary on c. 1305, in *Pamplona Com.*
2. Ibid.
3. Cf. A. BARROSO DE OLIVEIRA, *Vontades pías (Estudo histórico-canónico)* (Vila Real 1959), p. 156.
4. Cf. R. NAZ, "Fondations pieuses," in *Dictionaire de droit canonique,* V, col. 867.

4. A prudent and profitable placement of the endowment requires adoption of measures leading to preservation of the capital over time. It will then be necessary to use a portion of the income to fund the capital.

In art. 4 of the General Decree of the CBS on certain special financial matters,[5] there is a provision on this matter that states the following: "The local bishops, c. 1284 § 2,4° notwithstanding, may designate to diocesan needs any foundation income that exceeds full satisfaction of the foundation's obligations and required refunding of capital so that the foundation suffers no deterioration."

There is not, however, in the General Decree any norm with a provision similar to the one in the Conclusions approved by the XXXI Plenary Assembly of the Bishops Conference (June 2–7, 1979), in which no. 4 stated, "The local bishops of Spain may constitute in their dioceses a common fund with the goods from various foundations so as to facilitate their administration and obtain greater income, by assigning to each foundation the corresponding portion of the common fund."[6] However, without merging the foundations' patrimonies (a possibility that appears not to be in accordance with the obligation imposed by this canon to list *individua* the charges that encumber the goods), there is nothing to prevent managing them jointly but with separate books, if possible.

5. *BOCEE* 6 (1985), pp. 66–69.
6. Cf., *El Derecho patrimonial canónico en España* (Salamanca 1985), p. 414.

1306 **§ 1. Fundationes, etiam viva voce factae, scripto consignentur.**

§ 2. Alterum tabularum exemplar in curiae archivo, alterum in archivo personae iuridicae ad quam fundatio spectat, tuto asserventur.

§ 1. All foundations, even if made orally, are to be recorded in writing.

§ 2. One copy of the document is to be carefully preserved in the curial archive and another copy in the archive of the juridical person to which the foundation pertains.

SOURCES: § 1: c. 1548 § 1
§ 2: c. 1548 § 2

CROSS REFERENCES: cc. 117, 1283, 1284 § 2,9°

COMMENTARY

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1. The written form is logically not of the essence in a foundational juridical transaction. A foundational intention expressed orally is effective provided that it is not defective, and that the goods, purposes and, although summarily, organization are specified. This canon recognizes that fact and refers to foundations "etiam viva voce factae," suggesting that putting it in writing is a subsequent obligation that does not affect its validity. According to Naz, this precept, obviously from the previous codical regulation, had two purposes, one probatory and the other "especially to establish the consistency of the obligations [the foundation] carries with it."[1]

2. The obligation to create a written deed for the foundation affects both autonomous and non-autonomous foundations. With respect to autonomous foundations, the deed should include the statutes of the foundation. The requirement that they be in writing is indirectly derived from the obligation that they be approved.

3. Under the law of Spain, for the purposes of civil recognition of an autonomous foundation, the contents must be taken into account and must be inserted in the deed of the autonomous foundation so that it may

1. R. NAZ, "Fondations pieuses," in *Dictionnaire de droit canonique*, V, col. 866.

be entered in the Register of Religious Entities, as provided in Royal Decree 589/1984 of 8 February.

4. In § 2 it is ordered that two copies of the foundation deed be placed in safekeeping. One is to be in the archives of the interested juridical person (the foundation itself, if it is autonomous) and the other in the curial archives. The curia may be the diocesan one or, if applicable, the curia of the major superior of the institute of consecrated life.

1307 **§ 1. Servatis praescriptis cann. 1300–1302, et 1287, onerum ex piis fundationibus incumbentium tabella conficiatur, quae in loco patenti exponatur, ne obligationes adimplendae in oblivionem cadant.**

§ 2. Praeter librum de quo in can. 958, § 1, alter liber retineatur et apud parochum vel rectorem servetur, in quo singula onera eorumque adimpletio et eleemosynae adnotentur

§ 1. When the provisions of Cann. 1300–1302 and 1287 have been observed, a document showing the obligations arising from the pious foundations is to be drawn up. This is to be displayed in a conspicuous place, so that the obligations to be fulfilled are not forgotten.

§ 2. Apart from the book mentioned in Can. 958 § 1, another book is to be kept by the parish priest or rector, in which each of the obligations, their fulfilment and the offering given, is to be recorded.

SOURCES: § 1: c. 1549 § 2
§ 2: c. 1549 § 2

CROSS REFERENCES: cc. 396, 1300–1301

COMMENTARY

José María Vázquez García-Peñuela

1. The content of c. 1549 of *CIC*/1917 is reproduced in c. 1037 with a few small variations. Like its predecessor, it contains some precautions which are added to the others in the title, tending to ensure strict fulfillment of pious dispositions, specifically, so that fulfillment does not decline with the passage of time.

2. One of the changes from the prior Code's regulation is that the new one does not say that the list of obligations needs to exist in all churches (*in qualibet ecclesia*). This expression gave rise to an argument over whether it should be understood that the obligation extended only to churches proper, or to all moral persons even though they had no church and their obligations did not consist of Masses.[1] In the current regulation, with the expression excluded, it could be considered that the obligation to

1. Cf. A. BARROSO DE OLIVEIRA, *Vontades pías (Estudo histórico-canónico)* (Vila Real 1959), p. 161, note 1.

make a list could also affect autonomous pious foundations. However, there are reasons to think the opposite. First, c. 1303, the only one that refers directly to autonomous pious foundations, is not among the canons mentioned in c. 1307, considered to be consequential to the preceding canons. Second, there is a reference to c. 1287, which establishes the duty of administrators of ecclesiastical goods to give an account of financial transactions. However, the goods of autonomous pious foundations belonging to private juridical persons, which will be the most common case, are not of the same nature. Lastly, the allusion to the parish priest or rector in § 2 appears to favor the interpretation that the requirement to make the list of obligations extends only to juridical persons with obligations of Masses or other worship services derived from non-autonomous pious foundations.

3. The list should include figure all the obligations that need to be fulfilled. Aznar Gil, following Vromant, says that "the amount of money accepted for the foundation, the date of its acceptance and the name of the founder should not be written in this list or book; it is sufficient to describe the obligations of the foundations in detail."[2] In practice, the mandate to post it in a visible place may be fulfilled by placing the list in the sacristy (for example, near the liturgical calendar).

Drawing up the list of obligations should involve no difficulty if the obligation to make a *detailed* list of them as specified in c. 1305 is met. The list should be updated when any of the modifications specified in cc. 1308–1310 occur.

4. In addition to the list of obligations, by mandate of § 2 a book noting the fulfillment of the obligations must be kept. As the list specifies what the obligations are and their frequency, the book will be a daily record of the way in which they are fulfilled. The book shall be shown to the ordinary during his visit to verify fulfillment of the pious dispositions as provided in c. 1301. The alms referred to in § 2 *in fine* may be present (and their actual delivery should be noted in the book) if, apart from acts of worship, acts of charity are indicated in the foundation.

2. F. AZNAR, *La administración de los bienes temporales de la Iglesia. Legislación universal y particular española* (Salamanca 1984), p. 152.

1308 **§ 1. Reductio onerum Missarum, ex iusta tantum et necessaria causa facienda, reservatur Sedi Apostolicae, salvis praescriptis quae sequuntur.**

§ 2. Sibi in tabulis fundationum id expresse caveatur, Ordinarius ob imminutos reditus onera Missarum reducere valet.

§ 3. Episcopo dioecesano competit potestas reducendi ob deminutionem redituum, quamdiu causa perduret, ad rationem eleemosynae in dioecesi legitime vigentis, Missas legatorum vel quoquo modo fundatas, quae sint per se stantia, dummodo nemo sit qui obligatione teneatur et utiliter cogi possit ad eleemosynae augmentum faciendum.

§ 4. Eidem competit potestas reducendi onera seu legata Missarum gravantia institutum ecclesiasticum, si reditus insufficientes evaserint ad finem proprium eiusdem instituti congruenter consequendum.

§ 5. Iisdem potestatibus, de quibus in §§ 3 et 4, gaudet supremus Moderator instituti religiosi clericalis iuris pontificii.

§ 1. The reduction of Mass obligations, to be made only for a just and necessary reason, is reserved to the Apostolic See, without prejudice to the provisions which follow.

§ 2. If this is expressly provided for in the document of foundation, the Ordinary may reduce Mass obligations on the ground of reduced income.

§ 3. In the case of foundation Masses, whether in legacies or howsoever founded, which are separately endowed, the diocesan bishop has the power, because of the diminution of income and for as long as this persists, to reduce the obligations to the level of the offering lawfully current in the diocese. He may do this, however, only if there is no one who has an obligation to increase the offering and can actually be made to do so.

§ 4. The diocesan bishop has the power to reduce the obligations or legacies of Masses which bind an ecclesiastical institute, if the revenue has become insufficient to achieve in a fitting manner the proper purpose of the institute.

§ 5. The supreme Moderator of a clerical religious institute of pontifical right has the powers given in §§ 3 and 4.

SOURCES: § 1: c. 1551 § 1; CodCom Resp. XI, 14 iul. 1922 (*AAS* 14 [1922] 529); SCCouncil Resol., 21 maii 1927 (*AAS* 21 [1929] 116–119); SCCouncil Decr. *Cum haec Sacra,* 1 aug. 1941, SC-Council Decr. *Cum extraordinaria rerum,* 30 iun. 1949 (*AAS* 41 [1949] 374); *PM* I, 11, 12; PCIDSVC Resp. I, 1 iul. 1971 (*AAS* 63 [1971] 860); Secr. St. *Notif.*, 29 nov. 1971 (*AAS* 63 [1971] 841); PAULUS PP. VI, m. p. *Firma in traditione,* 13 iun. 1974 (*AAS* 66 [1974] 308–311); Secr. St. Normae, 17 iun. 1974

CROSS REFERENCES: cc. 1300, 1310

COMMENTARY

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1. Modification of obligations derived from pious dispositions is regulated in c. 1308 and the following two canons. Canons 1308–1309 refer to obligations consisting of the celebration of Masses; the first canon regulates their reduction, the second their transfer. Canon 1310 contains norms on the modification of obligations other than celebrating Masses.

2. Generally speaking, regulation of the matter of modifying obligations is what most differs from prior Code discipline through the effect of the reforms introduced based on Vatican Council II. Important milestones were the *Motu proprio* that established the powers of diocesan bishops with respect to reduction of obligations; the *Notificatio* of the Secr. St. of November 29, 1971,[1] in which everything related to stipends was totally and absolutely reserved to the Roman Pontiff so as to end a number of abuses and the corruption that was taking place[2]; and finally, the *Motu proprio Firma in traditione* (June 13, 1974),[3] on stipends for Masses, which ended the provisional situation of absolute reservation created by the *Notificatio* of 1971.[4]

3. By reduction is meant the modification of a pious disposition consisting of a decrease in the number of obligations but without varying the nature of the obligation. This type of modification is an exception to the

1. *AAS* 63 (1971), p. 841.
2. Cf. T. GARCÍA BARBERENA, "El motu proprio 'Firma in traditione' sobre estipendios de Misas," in *Revista Española de Derecho canónico* 31 (1975), pp. 89–90.
3. *AAS* 66 (1974), pp. 308–311.
4. Cf. A. LAURO, "La congregazione per il clero," in *La Curia Romana nella Cost. Ap. "Pastor Bonus"* (Vatican City 1990), p. 340.

principle in c. 1300 on fulfilling pious dispositions, where a just and necessary reason is always required.

4. Included in § 1 is the general norm on competence to proceed to the reduction of Mass obligations. It states that the matter is reserved to the Apostolic See, although this reservation has the exceptions provided in this canon. The dicastery competent to grant the reduction is the CC. In its practice, there is stated the principle of conservation of pious dispositions, so that Mass obligations will not be declared to be extinguished as long as the income is sufficient for the celebration of at least one annual Mass.

5. The first exception (§ 2) to the general reservation in favor of the Apostolic See is that the ordinary may proceed to reduce the Mass obligation of a foundation if it is both so provided in the foundation deed and necessary because the income has decreased. Now it happens that if the second of these circumstances is present, the first is not necessary in a case where the ordinary is the diocesan bishop. That is, if the income has decreased so as to be insufficient to cover the obligations of all Masses originally planned, keeping in mind the current stipend, then even if the pious founder has not authorized it, the diocesan bishop may reduce Mass obligations. This is understood from a reading of §§ 3 and 4 of c. 1308.

6. Nevertheless, interpretation of these two paragraphs is far from simple. The translation, "other foundations of any kind," refers to the obligations for Masses that legacies provide or from other foundations that are implied as being autonomous. It is certain that Paragraph 3 is an almost literal transcription of *Pastorale Munus* 11, which came to be embedded, so to speak, in a later regulation without taking into account the important changes in the regulation. Thus § 3 does not refer to the distinction between autonomous and non-autonomous foundations; it speaks only of "an aggregate of goods destined for the fulfillment of the Mass obligation."[5] If the income produced by the goods is not sufficient to cover the stipends for the Masses, that is when the number of Masses may be reduced. However, if there was a special obligation to recapitalize the foundation established in the pious disposition, it should be required that the person who is obligated allocate new goods before proceeding to a reduction, if it is thought that it will be effective.

7. From the point of view of how it fits into the system, § 4 is also complex. The reason lies in that fact that with some small changes, it comes from the same *Pastorale Munus* 12. This passage referred to Mass obligations incumbent upon ecclesiastical institutes. In fact it mentioned "beneficia aliave instituta ecclesiastica" institutions that have disappeared, at least in that form, in current code regulations. The power

5. F. AZNAR, *La administración de los bienes temporales de la Iglesia. Legislación universal y particular española* (Salamanca 1984), p. 160.

granted the diocesan bishop consists in reducing Mass obligations that encumber goods given to an ecclesiastical juridical person so that with the income the Masses may be held, but also to provide formally for fulfilling the purpose of the juridical person to which the goods were delivered. If this purpose is neglected due to lack of financial resources, some of the income, after a corresponding reduction, may theoretically be allocated to Masses to fulfill the purpose of the juridical person.

1309 **Iisdem auctoritatibus, de quibus in can. 1308, potestas insuper competit transferendi, congrua de causa, onera Missarum in dies, ecclesias vel altaria diversa ab illis, quae in fundationibus sunt statuta.**

Where a fitting reason exists, the authorities mentioned in Can. 1308 have the power to transfer Mass obligations to days, churches or altars other than those determined in the foundation.

SOURCES: Signatura Decisio, 6 apr. 1920 (*AAS* 12 [1920] 252–259); PAULUS PP. VI, m. p. *Firma in traditione,* III, c, 13 iun. 1974 (*AAS* 66 [1974] 308–311); Secr. St. Normae, 17 iun. 1974

CROSS REFERENCES: c. 1284 § 2,4°

COMMENTARY

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The canon refers to the transfer of obligations, but as in the previous canon, it is limited to obligations consisting of celebrating Masses. The power to transfer belongs to the same authorities as in c. 1308. As this may refer to either the ordinary or the diocesan bishop, it should be understood that, within the scope of his jurisdiction, any ordinary may transfer obligations.

The only condition established is the presence of a fitting reason, that is, that there is a motive that makes the transfer reasonable, such as "actual migratory movements of the population, changes in feasts, schedules and other similar reasons related to the actual transformation of society."[1]

The precept, which comes from no. III of the *Motu proprio Firma in Traditione,*[2] provides for two types of transfer: temporal and local. Local transfer may take place within the same church: Masses to be celebrated in a certain chapel or altar are celebrated in another. Additionally, it may be that the obligations of a church are passed to a different church even though it may belong to a different juridical person, but both are under the

1. T. GARCÍA BARBERENA, "El motu proprio 'Firma in traditione' sobre estipendios de Misas," in *Revista Española de Derecho canónico* 31 (1975), p. 98.
2. *AAS* 66 (1974), pp. 308–311.

jurisdiction of the same ordinary who transfers the obligations. Although the canon does not expressly say so, it appears consistent that before proceeding to transfer obligations the ordinary should hear the interested parties, principally the founder, if he is living, or the heirs, and representatives of the juridical persons upon which the original church and the new church to which the obligations are being transferred depend.

1310 **§ 1. Fidelium voluntatum pro piis causis reductio, moderatio, commutatio, si fundator potestatem hanc Ordinario expresse concesserit, potest ab eodem fieri ex iusta tantum et necessaria causa.**

§ 2. Si exsecutio onerum impositorum, ob imminutos reditus aliamve causam, nulla administratorum culpa, impossibilis evaserit, Ordinarius, auditis iis quorum interest et proprio consilio a rebus oeconomicis atque servata, meliore quo fieri potest modo, fundatoris voluntate, poterit eadem onera aeque imminuere, excepta Missarum reductione, quae praescriptis can. 1308 regitur.

§ 3. In ceteris casibus recurrendum est ad Sedem Apostolicam.

§ 1. The intentions of the faithful for pious causes may be reduced, moderated or commuted by the Ordinary, if the founder has expressly conceded this power to him, but only for a just and necessary reason.

§ 2. If it has become impossible to carry out the obligations because of reduced income, or for any other reason arising without fault on the part of the administrators, the Ordinary can diminish these obligations in an equitable manner, with the exception of the reduction of Masses, which is governed by the provisions of Can. 1308. He may do so only after consulting those concerned and his own finance committee, keeping in the best way possible to the intention of the founder.

§ 3. In all other cases, the Apostolic See is to be approached.

SOURCES: § 1: c. 1517 § 1; CodCom Resp. IX, 14 iul. 1922 (*AAS* 14 [1922] 529)
§ 2: c. 1517 § 2; *PM* I, 11, 12

CROSS REFERENCES: c. 1289

COMMENTARY

José María Vázquez García-Peñuela

1. Canon 1310 generally covers all modifications of obligations flowing from pious dispositions except for those that consist in celebrating Masses, which it is expressly stated must be subject to the prescriptions of c. 1308. The modifications referred to by that canon are reduction,

moderation or commutation. Reduction consists in a decrease in the number of acts in the obligation, but without changing their nature (see commentary on c. 1308). By moderation is meant the arrangement concerning something accessory to a pious disposition; it affects some accessory modifications in the performance of the imposed obligation that, however, is substantially fulfilled (for example, if instead of fifty sung Masses, the fifty Masses are prayed).[1] Finally, commutation consists in the exchange of one obligation for another (for example, the commutation of the obligation to give alms to the needy is exchanged for that of paying for a welfare project).

2. Contrary to what happens with the reduction of Masses, there is no general reservation to the Apostolic See for these other modifications of pious dispositions, with exceptions in favor of other ecclesiastical authorities. Instead, the competence of the Apostolic See is residual in nature (*in ceteris casibus*), for cases where, according to the provisions in §§ 1 and 2, the ordinary cannot modify the obligations.

3. The ordinary may proceed to decrease obligations with no other procedures or requirements if it was so provided in the foundation and if there is a just and necessary cause. Although this provision empowering the ordinary to modify obligations may not have been included in the foundation, he may proceed to reduce, moderate or commute with the following requirements: *a)* if fulfillment of the obligations as established in the foundation has become impossible; *b)* if this impossibility is not due to the guilt of the administrators of the endowments (in which case the modification of obligations may only be carried out by the Apostolic See); and *c)* if the interested parties have been heard (the founder or the heirs and the representatives of the juridical person upon which the foundation depends) and the finance committee.

4. The precept also mandates that the decrease in obligations must be carried out in an equitable manner, which assumes that if the income allocated to the obligations profits different beneficiaries, they should be affected proportionally; and the will of the founder should be respected as much as possible. For that purpose the foundational instrument should be carefully read and the reasons for which the foundation was created should be studied, if they were expressed, etc. Although it is true that "in the final analysis and if there is any doubt about the intention or the manner of achieving the testator's purpose, it is reserved for the judgment of the ordinary to determine,"[2] there is no doubt that the procedure of hearing the interested parties will be of great importance when the time comes to determine the foundational purpose.

1. Cf. A. BARROSO DE OLIVEIRA, *Vontades pías (Estudo histórico-canónico)* (Vila Real 1959), p. 172.
2. F. AZNAR, *La administración de los bienes temporales de la Iglesia. Legislación universal y particular española* (Salamanca 1984) p. 156.

5. From a formal point of view, any modification of obligations should be accomplished by decree. Logically, hierarchical recourse can be had against such a decree (the dicastery before whom the petition will be brought is the CC) and a contentious-administrative procedure may be pursued against a decision to deny.

PART II
Penalites for Particular Offenses

INTRODUCTION

Ángel Marzoa

1. *The question of the titulus*

This is a new title. In the first *Schema* submitted for consultation,[1] the generic title of the document refers to *sanctions or penalties*, although the corresponding study group is classified as *Coetus studiorum de Iure poenali* throughout all work sessions. The current title, "De Sanctionibus in Ecclesia," appeared in the 1980 *Schema*, whereas the *title* "De delictis et poenis," by which *CIC*/1917 designated book V, is applied to part I: "De delictis et poenis (in genere)."

We ought to wonder about the reason for this terminological change. For Nigro, there is no reason to try to give penal discipline a "less harsh" significance because the terms *sanction* and *penalty* have the same meaning. "This is seen clearly in *CIC*/1917," he points out, "where cc. 2195 and 2222 used the term *sanction* as a synonym of *penalty*; or in c. 1312 *CIC*, which uses the term *penal sanction* to classify the various types of penalties."[2] This comment is not without foundation. But, certainly the matter is not so clear. In the comments to the *Schema novissimum*, there was an *animadversio generalis* in which it was proposed to make the title of the book "De Disciplina Morum et de Sanctionibus in Ecclesia." It was also proposed that, before treating penalties in general and offenses, there

1. CODE COMMISSION, *Schema Documenti quo disciplina sanctionum seu poenarum in Ecclesia latina denuo ordinatur* (Typis Polyglottis Vaticanis 1973).
2. Cf. F. NIGRO, in P.V. PINTO (Ed.), *Commento al Codice di Diritto Canonico* (Rome 1985), p. 749.

should be in the same book a space devoted to the *disciplina morum* and remedies "sive pastoralibus sive poenalibus." The reason appeared to lie along the lines of some aversion to penal law presented without other details and balancing factors. The response of the *coetus* to this, however, was, in no uncertain terms, "Ius poenale ad essentiale tantum contractum est." Regarding the title, the *coetus* did not accept the proposal because *disciplina morum* is treated throughout the Code. From these words, we may deduce that, at least in book VI, the term *sanctio* has a clear and strict penal meaning.[3]

In any case, it can be seen that the issue of the name was not pacific. In reality, during the *iter revisionis*, there was formed a line of opinion (minority, but nonetheless present) that wanted to remove the penal nature of the book in favor of discipline of the sanctioning type, a disciplinary system adhering less to the rigid concepts of offense and penalty, and more along the lines of a sanctioning administrative system than a true penal system.[4]

In other words, together with "penal law," during the *iter revisionis*, two other concepts were being considered: "discipline" and "sanction." De Paolis makes a lucid analysis of the two terms in light of their possible application to penal law.[5] After giving illustrative references to these terms in the *CIC*, he arrives at the following conclusions, which we fully share:

a) Throughout the *CIC*, the term "sanction"[6] refers to an intervention by the competent authority or by the law, by virtue of which a confirmation (cf., e.g., c. 578), approval or recognition (cf. c. 207 § 2) with juridical value is given, a juridical link is created, or a penalty is imposed. The specific meaning in each case should be deduced from the context in which it is used.

b) The use of the term "discipline" is also equivocal. It may signify a norm of conduct, a group of norms or even the result of a manner of acting according to norms. Therefore, concludes the author, in answer to those who claim that it is not penal law but rather a *disciplinary system*, it must be said that the Code contains not only a set of disciplinary norms

3. Cf. *Comm.* 16 (1984), p. 38.

4. Cf. Á. MARZOA, "Sanciones canónicas y penas canónicas," in *Ius Canonicum* 28 (1988), pp. 181–196; especially pp. 189–192, where one also can refer to a bibliography of articles setting forth this conception.

5. Cf. V. DE PAOLIS, *De sanctionibus in Ecclesia (Adnotationes in Codicem: Liber VI)* (Rome 1986), pp. 16–17.

6. DE PAOLIS offers the following observations on this term in the *CIC*: such as, in book VI it only appears in the general title; aside from book VI it appears in cc. 96 and 1457 §2. We find it described as "penal," only in book VI, in cc. 1311 and 1312 § 1, and in the rubric of tit. III of pt. I. One can therefore infer that the term "penal sanctions" has the univocal meaning of "penalties." Something similar occurred in *CIC*/1917, where the term "sanction" could either have a penal (cc. 2195 §1, 2280 §2, 1933, etc.), or non-penal meaning (cc. 232 §2,1°, 323 §1): Cf. *De sanctionibus*..., cit., p. 16.

scattered through all the books but also, and separately, a real *ius poenale*, clearly different. This is evident in the light of the technical notions given on offense and penalty and from the systematic perspective of devoting a separate book to penal law.

2. *True Penal Law*

In the final analysis, what was at stake in the terminology discussion referring to the title was the question of whether in the law of the Church a real and proper penal law must be recognized and therefore codified.

Behind the ideas of the "anti-penalists" lies an appeal to the "spirit of Vatican Council II" along the lines of a rather ambiguous use of the concept of *communio*. A *ius communionis* does not appear compatible with a penal coercive law—which would be, to put it in simplified terms, a formulation of their position. At most, a lightly disciplinary regulation would be admissible, with some necessary sanctions, but without the rigor and harshness of penalties.[7]

The idea, being romantic, is actually attractive and tempting: a "Church" with labile frontiers, generously open to indeterminate charisma, undemanding of personal conduct, where only certain behavior with repercussions in the community, such as that deriving from the exercise of some public function, should be regulated and if necessary, the requirement for proper behavior reinforced by disciplinary measures. A community to which its members belong through an act of faith should not be subjected, according to this conception, to a penal *coercive law*. The Church's salvific activity, which should be founded on voluntary human behavior, should not be obscured by recourse to coercive power. Communion and charisma open horizons for comprehending ecclesial reality that would be cut off by the presence of a rigid and formalistic system of offenses and penalties.

A detailed reply to such a conception would lead us to consider the limits within which a rigorous foundation of law in the Church should move, but this is beyond the scope of this introduction to book VI. We shall limit ourselves to a few reflections on the subject, insofar as justification of canonical penal law requires it.

"*Communion* [...] does not signify an imprecise *sentiment*, but an *organic reality* that requires juridical form and at the same time is inspired by love" (*pen* 2°). It seems that the requirement for "juridical form" should not be interpreted in terms of "appearance." The statement must be understood in light of other precise words of the conciliar magisterium:

7. Cf., e.g., P. Huizing, "Crimen y castigo en la Iglesia," in *Concilium* 28 (1967), pp. 306–307; also idem, "Problemas de Derecho canónico penal," in *Ius Canonicum* 8 (1968), pp. 203–214.

"as the assumed nature [of the incarnate Word], inseparably united to him, serves the divine Word as a living organ of salvation, so, in a somewhat similar way, does the social structure of the Church serve the Spirit of Christ who vifivies it, in the building up of the body (cf. Eph 4:16)" (*LG* 8). With no intention to belittle its fecund ecclesiological content, we may read the conciliary statement, within the framework of the matter we are treating, in the sense that the organic reality is that *communio* requires a juridical form derived from the very sociality that is properly the Church's. This sociality, and therefore also its juridical form, must be understood with respect to the Church as human nature in the divine Word; that is, nature assumed in the Word to be authentic human nature, not fictitious or apparent, as it says in the creed "perfectus Deus, perfectus homo." *Communio* must be understood as an "organic reality" that requires "juridical form:" it is the proper *reality* of *communio*, entitatively organic, that by its very nature requires juridical form. The law is not something that happens *artificially*, for reasons of strategy or appropriateness at a given time, to a previously non-juridical reality. It is that this reality demands juridical form because juridicality is one of its dimensions.

Juridical form, in any case, like all reality, of which it is a part (*communio*), will be inspired by charity; but this inspiration, if we may so speak, is a second act that presupposes an object upon which to be projected. That is what allows law not to be confused with charity, and that is what allows us, without confrontations and without dialectics, to say that the law must be shaped in its application by charity. This does not allow us to say that "charity" must be substituted for law; then we would be very close to the *communio* that signifies an imprecise sentiment. And then we would no longer be before the Church, but before a group of humans inspired with meritorious sentiments, but at the mercy of the arbitrariness and arrogance that are so rooted (*his in terries*) in the events of human relationships.

The two council texts that we have cited are the same ones cited by the Code Commission to rationalize the "juridical nature" of the Code as a requirement of the "ipsa natura socialis Ecclesiae."[8] Immediately thereafter, it adds a statement that seems illustrative of the terms in which an *ius coactivum* in Church law should be understood: "In these canons [referring to the whole *CIC*] Christian faithful should find how to conduct themselves in their religious life if they wish to participate in the goods that the Church offers in order to achieve eternal salvation."[9] Such a statement clearly and roundly wards off any objection to the existence of a coercive regime in the Church. As already suggested, the arguments of the

8. *Principles quae Codicis Iuris Canonici recognitionem dirigant*, in *Comm.* 2 (1969), p. 78. The relationship between the two texts is established in note 2, that also cites *LG* 1, and refers to the *Alocución* of Paul VI to the Pontifical Commission, from October 20, 1965: *AAS* 57 (1965), p. 988.

9. Ibid.

objection are usually included in the dazzling proposal that the act of faith must by its nature be freely given, and consequently would abhor any type of coercion that attempted to force it. Naturally, all one can do is adhere to such a statement without restrictions, for it is nothing more than a faithful transcription of c. 748 § 2. But, there is nothing in the statement nor in that canon contrary to the existence of a canonical *ius coactivum.*

Some things blind us because we do not look at them from the proper distance. If we wish to understand canonical *ius coactivum,* we must keep our distance, although then it might appear that we are too far from the object. Canonical penal law cannot be projected *in recto* on the act of faith, much less on the act of becoming a part of the Church, or even on her permanence or being faithful to her. Canonical penal law (and we believe all law, but this is not the case before us), is operative where, as the Commission lucidly explained, a member of the Christian faithful wants to participate in the goods that the Church offers with a view to salvation. Penal law is a part of the Church's public law and as such is concerned with the relationship between society and the individual, or, what amounts to the same, between the Church and the member of the Christian faithful. In the necessary context of this relationship, it has a bearing in the area of administering those goods. The law of the Church does not obligate, nor does penal law compel, *entering* the Church, nor even *remaining* in the Church. What it does obligate (and *ius coactivum* has its field here) is certain behavior *to the degree to which the adherent wishes* (this wish as such is not a subject of canon law) to be so considered, and as such to enjoy the status of member. Where, then, is the opposition between "the freedom of the act of faith" and penal law? There can be no opposition where there is no meeting. The act of faith and penal law cannot meet, because penal law *presupposes* and finds its point of departure in the very free act of faith or adhesion to the Church. What cannot be denied the Church, or any social organization, is the right to be present to defend its own identity and to reject anyone who, *from within* and without renouncing, or even boasting of or using, his status as member, tries to impose his own criterion through doctrine or behavior. For example, appealing to the dignity of a member of the Christian faithful, (*dignitatis humanae* has actually been cited) as a disqualifying instance of canonical penal law is as inconsistent as, in another order of things, to argue from *ius connubii* the inadmissibility of the impediment of ligamen; or from the natural law of association to impugn the statutes of an association.

Perhaps the lack of understanding of canonical penal law comes from the failure to distinguish sufficiently between two levels of analysis. One, where we have just been, speaking in consciously apologetic terms, is the existence of penal law within the canonical system. A different level is the appropriateness at a given time of having recourse to penal law. The first belongs in the rigorous conceptual world of science, if we leave aside the immediacy and singularity of the specific case. Recourse to penalties

in a specific case, however, assumes there will be a prudent decision that takes into consideration all circumstances, and here, prudence must display all its virtuosity.

The first level of analysis is brilliantly presented in a text from the pontifical magisterium: "in the vision of a Church which protects the rights of each faithful, but which furthermore promotes and protects the common good as an indispensable condition for the integral development of the human and Christian person, a penal discipline also plays a positive role: even that penalty threatened by the ecclesiastical authority (…) is seen as an instrument in the service of communion, that is, as a means to repair the deficiencies in the individual good and in the common good which were manifest in the antiecclesial, offensive, and scandalous behavior of certain members of the people of God."[10]

The second, where prudence must display all its weapons, is admirably reflected in a long text from the Council of Trent and conveniently included in the portico of pt. II of book V of *CIC*/1917. It is worthwhile to reproduce here *in extenso*: "Bishops and other Ordinaries are to be mindful they are pastors, and not slave drivers. Accordingly, they are to preside over those subject to them not as domineering masters, but as those who love them like their children and brethren. They are to strive, with encouragement and advice, to deter the faithful from doing what is not right, lest they be given no choice but to constrain them with the appropriate penalties whenever they do. Yet if, through human weakness, their subjects should happen to commit any manner of offense, the bishops and Ordinaries ought to observe that precept of the Apostle, according to which they are to reason with them, beseech them, and remonstrate with them with the greatest kindness and patience. For often, when dealing with those in need of correction, benevolence can accomplish more than austerity, encouragement more than threats, charity more than power. But, should the gravity of the offense call for punishment, one should employ rigor tempered with mildness, justice with mercy, and severity with tenderness. A discipline without harshness, which all people find necessary and beneficial, will thereby be preserved. Those who have received correction are to amend their lives or, should they not wish to come to their senses, their punishment is to serve as a salubrious warning to deter others from vice" (c. 2214 *CIC*/1917).

The spirit of this text is briefly referred to in c. 1341 when it calls upon the ordinary to have recourse to imposing penalties after exhausting all other pastoral means (imposing penalties is also "pastoral") available to him; and all of part I of book VI is imbued with this spirit when it establishes numerous restrictive clauses on the exercise of *ius puniendi*.

10. JOHN PAUL II, "Discourse to the Tribunal of the H.R. Rota," 1979, in *Teachings of John Paul II*, II/1 (1979), pp. 411–412.

If we distinguish these two level of analysis, we will avoid all danger of treatment that deviates from the question. Such a distinction, seen from the first level, permits us to consider the force of canonical penal law with serenity. Affirmation does not imply a wager for its greater or lesser presence in the Church's daily governance; it simply means recognizing one part of Church law that has a *raison d'être* and purposes that the jurist must take into account when studying the law, and the governing power when applying it. Only this serene and objective consideration will enable us to acquire the degree of knowledge of the penal system necessary to apply it, when the case arrives, with all the rigor, precision and justice that such a delicate juridical recourse requires.

This brings us to the second level. Superficially condemning and disdaining the penal system may lead to *abusive use* of canonical penalties, guided more by a temperamental reaction than by canon law. In that case, penal law does cease to be a pastoral means, extreme but still pastoral, for the Church to govern. *Ius coactivum* would be stripped of its *ius* and would appear as unvarnished coercion. Thus, one can understand the rejection of canonical sanctions, but only because they will cease to be canonical once they have ceased to be juridical. Canonical penal law is not in itself rejected, but rather force for the sake of force.

If we look objectively and scientifically at penal law, the juridical consistency of the entire system can be understood. Its norms can be adequately assimilated and once assimilated, they may be kept in mind. Only then, but now within the system, with regulated and objective reasons, will it be discovered that recourse to penalties must always be the exception, the *ultima ratio*. Only then, when "punishment is necessary due to the seriousness of the offense," shall punishment be ordered, with the distance and asepsis used by the surgeon after making his decision and proceeding to apply the knife, having first exhausted all recourse so that the material "cruelty" of the action will appear in all its truth as medicine to repress evil.

With these assumptions, we can understand that penal law is part of a canon law that is not an *appearance* of law, but real law, consubstantial with the sociality of the Church *his in terris*, and in the service of the Church. Within itself, penal law has its raison d'être, which is the defense *in extremis* of the dimensions of justice in the Church's visible structure, *within which* the baptized live joined with Christ, fully accepting the Church's constitution and all the means of salvation established therein (cf. *LG* 14), and the means used by the Church are the protection and reinforcement of "the bonds of profession of faith, of the sacraments and of ecclesiastical governance" (c. 205). It is significant that when c. 205 takes the words of *Lumen Gentium* 14, it omits mention of the *Spiritum Christi habentes*, the significance of which is the task and horizon of law. The law does look at the "visible structure" because it can only move within what is visible, that which can be perceived from the outside. Only there can it have otherness and be equated with what is just. The law

cannot prejudge nor grant the "Spirit of Christ;" its seat and field of operations is within the "visible structure" *within* which, here on earth, the event of salvation is accomplished. Like the social organism in which it operates, the law is "in the service of the Spirit of Christ," and it is vivified by the Spirit in order that it may, by fidelity to its task, collaborate in its glorious work so that "the body may grow." Within its task, it will occasionally be necessary to have recourse to extreme measures "so that the discipline that is healthy and necessary for the people may be retained without harshness." It will be necessary to have recourse to "penal discipline: (...) a means of communion, that is, a means to repair the deficiencies in the individual good and the common good that are shown in antiecclesial, offensive and scandalous behavior of the members of the People of God." This all takes place in the juridical seat, but without lowering our sight from the high mission of favoring the *salus animarum.*

3. *Penal law in the Church*

All of canon law, because it is canonical (—that is, because it is the law of the Church) must be impregnated with the sanctifying spirit that inspires all ecclesial reality. It is well known that the *salus animarum* is the *suprema lex* and "in Ecclesia suprema semper esse debet," as stated *in fine* of c. 1752, trying to illuminate all codical content beyond the book *De Processibus* itself: "Nothing is more appropriate than calling attention to the fact that canonical equity, the spirit of the Gospel in treating singular subjective situations, can and should be applied in harmony with the supreme law of the Church, the good of souls."[11]

However, if this directly sanctifying claim could be less advocated from any part of the Code, at first glance, it would no doubt be from penal law. It does not appear that, among the principal instruments a society may count on for the direct achievement of positive ends, the one to think of would be a system that represses behavior. Nevertheless, canonical penal law looks to the *salus animarum* that it holds as *suprema lex.*

Even at the risk of falling into repetition, it is worthwhile to attempt to explain it, with the understanding that it is how canonical penal law can be adequately justified.

a) *The lace of enal law in the context of the "salus animarum"*

Number 9 of the *Principles* that traced out the master lines of codical reform roundly stated that, although the criterion of reduction of penalties was to be adopted, suppression of the canonical penal system, postulated by a certain minority sector of the doctrine, "nemo canonistarum admittere videtur" (*Principles* 9). The Code Commission, definitively settling the question, forestalled doctrinal discussion on the

11. E. LABANDEIRA, commentary on c. 1752, in *Pamplona Com.*

opportunity and appropriateness of legislation on penal matters in the Code. In this regard, the title of the epigraph where the question is broached is very significant: "Caritas et coactiva potestas."

It states, "In the law of the Church it has been deemed necessary to retain the use of coercive power ..." This is consistent with the nature of the Church, which "seeks the good in its totality for all of its children, not only by generously bestowing upon them its goods, but also by protecting them during their journey toward salvation. Hence, the Church makes use of the appropriate means to ensure that the faithful not abandon this journey, and restores them in good order when they do stray from the path."[12]

This is a striking affirmation of the appropriateness and need for the presence of coercion in the life of the Church. It is preceded in the text by a statement from the Roman Pontiff that is equally clear: "One cannot forget that the coercive power is squarely founded upon the experience of the early Church, and that St. Paul already makes use of it in the Christian community of Corinth: the perspective offered by this reference should be enough to make us understand the pastoral significance of so severe a process, to which recourse is made only in the service of the spiritual and moral integrity of the entire Church and for the very good of the offender."[13] "Good in its entirety" and "integrity of the entire Church" are two enormously suggestive expressions for centering the place and the meaning of the canonical *ius coactivum*.

But, we can go a step further and find new specifics. Seven years later, Paul VI said, "The fundamental rights of the baptized have no effects nor can they be exercised if the [baptized] do not accept the concomitant obligations implied by baptism itself, above all if it is not done in communion with the Church; furthermore, these rights are ordered to the building up of the Body of Christ, which is the Church. Their exercise, however, ought to be in consonance with order and peace, for it is not licit for them to cause harm."[14]

Thus, punishment is directly presented as an *instrument of communion* in the context of promoting and protecting the common good, which is an indispensable condition for the integral development of the human and Christian person. Here we have the connection between the *total good*, the *integrity of the entire Church* (*communio*)and the individual person upon whom the punishment actually falls. Here we also have the proper place for canonical punishment in the perspective of the *salus animarum*, as a means of repairing the deficiencies of that good in both its individual and common dimensions.

12. *Schema Documenti quo disciplina sanctionum seu poenarum in Ecclesia latina denuo ordinatur* (Typis Polyglottis Vaticanis 1973), p. 11.
13. PAUL VI, "Discurso al Tribunal de la S. R. Romana, 1970," in *Insegnamenti di Paolo VI*, VIII (1970), p. 89.
14. Ibid., XV (1977), p. 125.

b) *The purpose of penal law and of the Church*

Can penal law really be related to the Church's purpose? Or what amounts to the same thing, what is the relationship between canonical penalties and the *salus animarum*? We think it worthwhile to stop and consider this, even briefly. On reflection, this will mean to touch on the Gordian knot that lies behind the so-called conflicts between exercising *ius coactivum* and the very being of the Church from another perspective.

We cannot speak of the Church's objective and the objective of penal law as if they were two comparable objectives; the same can be said, furthermore, of the purpose of the whole of canon law. It is impossible to understand the objective of penal law in its just terms from a statement that fully covers the Church's objective, or what amounts to the same, the Church's *being*. Neither can many ecclesial realities be understood. If the comparison is allowed, it would be like trying to *understand* a lifeboat from the complex context of a transatlantic liner.

When we look at the Church's objective *from the perspective* of penal law, from the lifeboat to the liner, we must keep in mind that we are performing a *reduction* of the concept of Church. It is true that "the visible society and the spiritual community, the earthly Church and the Church endowed with heavenly riches, are not to be thought of as two realities. On the contrary, they form one complete reality which comes together from a human and a divine element" (*LG* 8). But, when this conciliary statement proclaims one reality, it does so by affirming a complexity that arises from the two elements that make up the unity. This complexity, in turn, authorizes us to make the *reduction* referred to. Penal law, in the context of canon law, can be properly understood only if the point of view is situated in the human element of the complex unity, in the "Ecclesia his in terris ut compaginem visibilem." Penal law, like all canon law, is understood from a consideration of the Church *in hoc saeculo*, and therefore from the consideration of its *specific objective* in its form as a society. Only from this consideration can we affirm, as the Roman Pontiff has done, that the Church "promotes and protects the common good as an indispensable condition for the integral development of the human and Christian person."[15] There the two concepts that we wish to distinguish are clearly indicated: promotion and protection of the common good, an intention and an end where the law is comfortable and serves it through being the guardian of a just social order, and the integral development of the human and Christian person. What better formulation could there be of sanctity, of the *salus animarum* from the perspective of the *Ecclesia terrestris*? The promotion and protection of the common good is ordered ("for" as in the cited quote of the Roman Pontiff) toward the integral development of the human and Christian person. However, it is ordered in as far as it is a necessary *prior*

15. Ibid.

condition so that it will not directly impinge upon that integral development of the person (the law does not intend sanctity *in recto*, only justice) but remain on the threshold, trying to make it possible. This means that the said nature, being inherent to penal law, does not deprive penal law of its own nature—a nature that makes it susceptible to be considered separately, although always inspired and *justified* (rationality) by the objective that, although fulfilling its *raison d'être*, nevertheless transcends it.

To conceive of the objective of penal law from *the* objective of the Church (*salus animarum*), without the details mentioned, and giving the term *objective* a single and full meaning, makes no sense. Evidently, from this perspective, there can be no penal law, because it has no possible justification, as we have already discussed, neither can the act of faith (origin), nor *salvation* (objective) be coercively imposed. Properly speaking, the *salus animarum* cannot be the objective of penal law, not even of canon law in general. It is true that the *CIC* describes the *salus animarum* as *suprema lex*, but this should not be understood in the sense of a direct objective. Hervada, among others, has satisfactorily described the canonical *locus* of the *salus animarum* as a "informing principle," and as such, it is both metajuridical and intensely demanding, for insofar as it informs, it becomes an instance of ultimate rationality for laws, the supreme ordination or *suprema lex*, according to the happy and classic expression found in c. 1752.[16]

Therefore, penal law must be understood from the objective *of canon law*, not confusedly from the objective *of the Church*. Seen from the perspective of this objective, coercive power appears as *potestas propria*, the exercising of which takes place in the external forum. Within the general objective of canon law, it moves preventively toward safeguarding, and in any case, toward the restoration of the social order that was harmed by the offense. Or, if you wish, using the terms we found in the pontifical magisterium, it moves towards "recovery of the deficiencies in the individual good and the common good that are shown in antiecclesial, offensive, and scandalous behavior of the members of the people of God."

Now, it can be properly understood that penal coercion in the Church has as its cause the *offense*, as means the *social harm* that the offense may cause, and as its objective, *restoration*.[17] This is a very strictly limited objective from which no overall vision of canon law, and much less of the Church, may be projected.

16. Cf. J. HERVADA, *El Ordenamiento canónico*, I. *Aspectos centrales de la construcción del concepto* (Pamplona 1966), pp. 186–233. Directly related with canonical penal Law, cf. J. ARIAS, "Principios básicos para la reforma del Derecho Penal canónico," in *Ius Canonicum* 10 (1970), pp. 185–208, and "El sistema penal canónico ante la reforma del *CIC*," in *Ius Canonicum* 15 (1975), pp. 225–234

17. See, for the notions of 'delict' and of 'social damage', the commentary on c. 1321; for 'restauración', commentary on c. 1312.

From this perspective, which is the right one, it makes sense to communicate in the scientific-technical area with other coercive exercises of the other social organizations that are also native. This does not necessarily involve a displacement or yielding of what is properly and singularly the Church's. The reason is that canonical penal law will always be "enriched" by the *individualization* that the *salus animarum* should use as an inspiring principle. This principle makes recourse to penalties always *ultima ratio*, after all other pastoral means have been exhausted (cf. c. 1341). It also means that when the time comes and the penalty is necessary, it is applied tempering "rigor with mildness, justice with mercy, severity with gentleness," according to the beautiful expression previously cited.

When we use the term *individualization* to describe canon law, we do so in the sense of contrasting that juridical reality with the juridical realities of other societies also *native*, and definitely with secular systems, that in turn also show individualizations with respect to canon law. But, this is in no way related to the fundamental concept of law with respect to which canon law is *as individualized* as any other law. In other words, it is not at all related, because the species is never *individualized* with respect to the genus, only with respect to other species of the same genus.

It seems that, with all that has been said, we are ready to understand penal law as an instrument in the service of the *salus animarum*, without diminishing this informing principle and without denaturing *ius coactivum*. We shall understand it insofar as this statement leads us to conceive penal law not as a directly *sanctifying* instrument, but as an instrument in the service of sanctification, becoming exhausted in its mission as an "instrument of communion." *Communio* is the directly sanctifying environment insofar as only in communion (*in Ecclesia*) is there full and fruitful access to the Word and the sacraments. The sacraments, on the other hand, are directly addressed to sanctification and are sanctifying in themselves. Using its own resources, penal law is limited, and that is no little task, to protecting *communio*.

Although salvation is not its proper and direct purpose, it must be said that, just as any institutional reality of the Church does, penal law influences the salvation perspective "so that the body may grow" (*LG* 8). This happens, in the words of Nigro, "above all when it tries to ensure for each and every one of the faithful the peaceful enjoyment of their rights; also, by removing the obstacle the person being punished himself has raised, offering the opportunity to rectify the behavior that is an obstacle to salvation and motivating him to recover ecclesiastical communion and once again to enjoy the benefits of salvation from which he was separated by his antijuridical behavior."[18]

18. F. NIGRO, "Le sanzioni nella Chiesa come tutela della comunione ecclesiale (Libro VI CIC)," in *La nuova legislazione canonica* (Rome 1983), p. 425.

PARS I
De delictis et poenis in genere

PART I
Offenses and Punishments in General

INTRODUCTION
Ángel Marzoa

1. *Introduction*

Current universal penal legislation is very restrictive with the specific classification of offenses; thus it leaves a broader field of action to particular law (in this regard, see Introduction to book VI, pt. II). For this reason, greater attention must be paid to the framework of the legislation under which exercising the *ius puniendi* in the Church must be governed through particular law.

Therefore part I of book VI is a general part of penal canon law. It includes norms on the concept and types of offenses in general and the type and nature of canonical penalties; on the sources of penal law (law and precept); on imputability; on methods of imposing and remitting penalties; and finally, on all institutions referenced in penal matters, such as complicity, concurrence of offenses, attempted offense, and prescription of the criminal action.

For the proper application of penal law, the norms must be uniform for the whole Church, and everyone should observe them. This task cannot be left to particular law, for it is unlikely that the norms could be given a minimum of uniformity, even if they all started from the same principles. Therefore, this general part is not an enumeration of inspiring principles, although they are present, but of penal legislation binding on the future production of universal or particular penal norms, as well as on the application of the laws of the next section (part II: "Penalties for Particular Offenses") and all norms with penal content that may be produced under a law or precept in the future.[1]

1. Cf. *Comm.* 2 (1970), p. 100; CODE COMMISSION, *Schema Documenti quo disciplina sanctionum seu ponearum in Ecclesia latina denuo ordinatur* (Typis Polyglottis Vaticanis 1973), *Praenotanda*, p. 5.

Offense and *penalty* are the institutions which are the protagonists of all penal law, and they give their name to part I. Without prejudice to questions that may be treated in their respective commentaries, it seems appropriate to analyze both terms in the context of the Church's penal law.

2. *The offense*

The first basic institution is the offense. Clarifying this concept in the canonical area by specifying its scope and making the necessary exclusions to permit discussion of the matter with a minimum of rigor is an unavoidable prerequisite for speaking properly about penal canon law.

To speak of an offense is to speak of *antiecclesial behavior*,[2] but all antiecclesial behavior is not automatically an offense. If only offenses are sanctionable with penalties ("nemo punitur, nisi...": c. 1321), we must conclude that not all antiecclesial behavior is punishable *per se*.

Therefore it is of interest to determine what constitutes an offense in canon law: what is it that, in the final analysis, makes certain antiecclesial behavior punishable and other antiecclesial behavior not punishable.

The old Code offered a definition of offense: "nomine delicti, iure ecclesiastico, intellegitur externa et moraliter imputabilis legis violatio cui addita sit sanctio canonica saltem indeterminata" (c. 2195 § 1 *CIC*/1917). Leaving aside for the moment the terms "external" and "morally imputable" (see commentary on c. 1321), one are left with *violatio legis*. Thus an offense is a "violation of the law that carries a penal sanction."

The technical nature of the definition in the superseded *CIC* resulted in the apparent configuration of the offense as *a violation of a penal law*, and nothing more. However, in the broader sense, but more respecting of its nature and justification, we should understand an offense as *an action contrary to justice*. Yet we must understand that, on the one hand, justice must not be interpreted in terms of "sanctitas," or an offense would be any action contrary to "sanctitas." On the other hand, the measure of justice in positive law cannot be considered exhausted, for an offense cannot be reduced to merely a violation of a law or penal precept.

To understand "justice" in terms of *sanctitas* would be to fall into the error of identifying the purpose of the Church with the purpose of law, particularly with the purpose of canonical penal law, without further specification. The attempt to *make saints* through coercion is repugnant to penal canon law, just as it is repugnant to canon law in general to involve it in immediately and directly transcendental ends (see Introduction to book VI).

2. Cf. JOHN PAUL II, "Discurso al Tribunal de la S. R. Romana, 1979," in *Insegnamenti di Giovanni Paolo II*, II, 1 (1979), pp. 411–412.

In addition, to reduce the comprehension coordinates of offense absolutely to positive law would be to reduce the foundation of penal law to the narrow margins of juridical positivism.

Therefore it must be pointed out that c. 2195 *CIC*/1917 did not definethe fundamental concept of offense, but a *positive* or *already formalized* offense. It shows us the figure of offense from the formal perspective of juridical science, which starts from the legal data. Therefore an offense is evidently nothing more than *a violatio legis*. But, the scientific level from which this definition operates results in a definition that is valid at that level. It defines a legal offense but cannot tell us *why* this action is an offense that transcends the legal data (*violatio legis*) and goes back to its ultimate causes.

To achieve this objective, one must look from the perspective of a fundamental level. Then, one can say that the essence of offense is not found solely in the concept of *violatio legis*. An action is not an offense because the law provides punishment for it; instead, the law determines that it should be punished precisely because the essential constitutive elements of offense are found in the action (*prohibitum quia malum*, not *malum quia prohibitum*, says the classic synthesis of wisdom).

In the investigation of why a given action is an offense, is where one finds penal *canon* law distinguished from other penal law. In the ultimate reasons for the offense, canonical science must separate itself from the paths of secular science, because the reasons for which an action is an offense (*antiecclesial*) are particular with respect to secular law (the same could be said of secular penal law, as opposed to penal canon law).

The inspiring principle of penal law must be shaped from the *ultimate reasons* for its existence. When determining what an offense is, one must think of conduct diametrically opposed to the Church's sanctifying mission, the *salus animarum*. Then, one can clearly see a series of nuclei in the *ecclesial common good*, an environment that is required for carrying out the sanctifying mission. The nuclei that need this penal protection are sanctity and unity, governance and liberty, the sacraments, special obligations, human life and liberty ... (These are the titles of part II of book VI. All of them fit into the *tria vincula* used in c. 205 to describe full *communio* with the Church: faith, the sacraments and the ecclesiastical regimen).

So, the legislator *classifies* as an offense any behavior that he considers at a given time to be most intensely disturbing to these nuclei. Thus one may definitively speak of an *offense* as violation of a law, specifically a law that classifies certain behavior as an offense. But, in its substance, this behavior is not an offense because it *is included* in the law, but it is included in the law because it is *antiecclesial* and an *offense*. It is an obstacle to the *munus santificandi*, insofar as the "humus" in which the *munus* which must be made fertile is damaged.

In the terminology of penal-juridical science, one would say that, in order to be punishable, an offense must involve two elements (putting aside for the moment the subjective element, which presents no major difficulties of comprehension): the objective element and the legal element. The objective element requires that, to be described as an offense, the action must have a juridically apparent *anti-ecclesial* element: an attack on the fundamental nuclei of the ecclesial common good necessary for the development of the person as a human and a Christian. In turn, the legal element requires that the legislator indicate at a given time, the time of codification, for example, which *offensive* actions should be sanctioned with canonical penalties. This indication by the legislator is what gives rise to the *legal offense*, through the technique of classification.

Why is it necessary for the legislator to determine the offenses? The first reason is to avoid allowing penal law to be converted into a kind of knight errant, as jealous as he is lacking in discernment, who tilts his lance at every moving windmill or herd of sheep showing the least sign of unrest.

The second reason bring us back to our subject, from which we have semingly digressed. The legal element requirement does not depend merely on a kind of "self-limitation" of the *potestas coactiva* when it represses offensive behavior. Since it would be impossible to cover everything, it is *politically* more effective to concentrate on the most pressing areas. On the contrary, there is, in the required legal elements, a motivating force that intervenes by its own strength between the authority and the exercise of the *potestas coactiva*, a force that requires the legislator to classify certain anti-ecclesial behavior and exclude other anti-ecclesial behavior. This motivating force is *personal dignity*, an essential and firmly operating value in canon law. Such a value is repellent to exercising the *potestas puniendi* in a discretionary way, with possibilities for acting arbitrarily, to the degree that it materially assumes a juridical lack of defense or protection and at the same time a risk in exercising that power. This is exacerbated because canonical penalties affect the fundamental goods of a faithful member that are necessary for him to become and be a Christian. When c. 221 § 3 states that "Christ's faithful have the right that no canonical penalties be inflicted upon them except in accordance with the law," it is recognizing the *constitutional* value (keep in mind the place occupied by this canon) of the legal element. This cannot be explained other than by the value of the constitutional rank that requires this conformity with the penal norm. The way this *right* of the faithful operates obviously cannot be extended to a self-limiting option of the authorities. It is a value that is *necessary* as an assumption before exercising the *potestas puniendi*.

It is clear that we have reached justification of the legal element, necessary for an understanding of the concept of offense, not only without leaving the typical canonical scope, but penetrating its innermost depths.

The fact that, at a given time during the development of juridical science in general, this requirement was formalized into the principle of legality, and that its reflection in the penal area created the need for prior classification of the offenses—all this is merely a question of technical resources that in no way denatures what is truly canonical in the Church's penal law. Techniques do not give or take away the nature of anything; they are simply useful or not useful, they serve or do not serve a particular end. In the same way, legislating the formalities required for a juridical transaction to be valid by using the common sense derived from achievements in juridical science does not denature a canonical entity of certain juridical relationships, nor does using a computer to deal with a Biblical text in any way detract from the inspirational character of the text.

Therefore an offense is presented as behavior that is an obstacle to the sanctifying mission of the Church. It is an obstacle *in* both the person of the offender and *in* all of ecclesial reality. Its punishment by the authorities is, when applied, a ministry of *communion*: that is, it is the use of a means necessary to amend the lack of individual and common good shown in offensive and anti-ecclesial behavior on the part of members of the people of God.[3]

Now, one can say that, after demonstrating that other means of pastoral solicitude are insufficient (which undoubtedly assumes having made generous and effective use of them), it is the duty of the authority to promote a judicial or administrative procedure to impose or declare penalties (cf. c. 1341).

3. *The penalties*

Assuming an offense has been committed, and after exhausting other means of pastoral solicitude (cf. c. 2214 *CIC*/1917), recourse to penalties as a means of repairing the scandal, restoring justice and reforming the prisoner is an *ultima ratio* (cf. c. 1341).

Penal sanctions in the Church are medicinal penalties or censures, and expiatory penalties (c. 1312). It is well known that the current *CIC* substitutes "expiatory" for the old adjective "vindictive" (taking this new term from St. Augustine's *De civitate Dei* 21, but the term had been previously used in the definition of these offenses given in c. 2286 *CIC*/1917), so as to avoid the pejorative tinge of retribution that the expression *vindicta* might carry but this does not presuppose any modification in the nature of this type of penalty.[4]

3. Cf. JOHN PAUL II, "Discurso al Tribunal de la S. R. Romana, 1979," in *Insegnamenti di Giovanni Paolo II*, II, 1 (1979), pp. 411–412.
4. Cf. J. ARIAS, commentary c. 1312, in *Pamplona Com.*

These two types of penalty reflect the diversification of purpose made by *CIC*/1917 in the general definition of canonical penalties as "privatio alicuius boni ad deliquentis correctionem et delicti punitionem a legitima auctoritate inflicta" (c. 2215 *CIC*/1917). Thus, *censures* are defined as medicinal penalties, by means of which "homo baptizatus, deliquens et contumax, quibusdam bonis spiritualibus ver spiritualibus anexis privatur, donec, a contumacia recedens, absolvatur" (c. 2241 *CIC*/1917). The particularity of this type of penalty lies in the prerequisite of contumacy; the direct purpose is to break it. Expiatory penalties "illae sunt, quae directe ad delicti expiationem tendunt ita ut earum remissio e cessatione contumaciae delinquentis non pendeat" (c. 2286 *CIC*/1917).

The medicinal/expiatory distinction must be properly understood. One might think it is a direct consequence of the two types of purpose enumerated in the general definition of canonical penalties in the old c. 2215: *ad delinquentis correctionem* (medicinal penalties) and *ad delicti punitionem* (expiatory penalties).

If adequately understood, such a distinction is valid, but it suffers from a certain degree of ambiguity to which we would like to call attention. If it means that there is a type of penalty (medicinal) the *sole* purpose of which is to correct the offender, while the others *solely* pursue punishment of the offense (expiatory) in such a way that these two ends are mutually exclusive, then the conclusion is unacceptable. From the definition of canonical penalties, it cannot be held that one type does not pursue punishment of the offense (medicinal) and the other type has absolutely no interest in correcting the offender (expiatory). This is because it cannot be held that the canonical penal system is not one, but two systems, one coercive/repressive and the other medicinal.

This type of conclusion would justify taking a stand, (worth subscribing to in all its terms), radically contrary to the existence of penal canon law. First, this is because medicinal penalties would not properly be *penalties*, as is evident. Also, if one looks at expiatory penalties, in no way can a penal system be conceived, (and it seems that it would also have to be held in secular laws) that had as its absolute purpose to repress offensive behavior for the benefit of the common good but with prejudice to a proper consideration of the person of the offender. Such a person belongs to the same social organization and therefore must also be included in the purpose of the action by the authority who looks at the overall society of which the offender is an *integral* part.

Underlying these considerations is an old question that was very much alive during the century preceding codification fervor and to which the canonical doctrine that preceded the first codification was not alien, as is logical. This is the debate between the Classic School and the Positive School, which postulated the absolute theory and the utilitarian or relative theory respectively as justification for penal law.

Reducing the question to general terms, with all the limitations that generalization implies, the absolute theory justifies imposing penalties as an "absolute" need for justice: justice *per se* requires that everyone receive reward or punishment according to his actions (*retributio*). Therefore, every offense should entail a penalty, regardless of whether the penalty is useful to the society or to offending person. It is justice itself (*absolute*), *a priori* and regardless of any other consideration, that requires that any infraction of the just order bear with it the corresponding penalty. This allows one to understand, for example, why in this theory the irrelevance of *ignorantia iuris* is postulated, although it is present in penal norms of secular law. Of course, this theory has meant a great advance compared to the arbitrariness and disproportionality of imposing penalties. It arose in the rationalist period of the 18th and 19th centuries, as a reaction to the medieval penal system, which degenerated further under the absolutism of the 17th century. In that sense, there has been noticeable improvement in the concept and in the regulation of imposing penalties. But, it is difficult to provide a satisfactory foundation for this type: what human yardstick can demonstrate what is *absolutely just*?

Next, the relative or utilitarian theory arose. It was postulated in the Positive School, the name of which adequately situates it within the immanentist philosophical currents that were widespread in the 19th and 20th centuries. For this school, between offense and penalty there is no absolute nexus based on justice, but a merely *extrinsic* and relative nexus based on utility. The *ratio* of punitive power lies not in the intrinsic malice of the offense (which is a requirement for absolute justice) but in the prejudice or harm considered in itself, to which the offense leads, together with the need to care for the good of society (*theoretically* not excluding the good of the offender himself). Therefore, punitive power does not have a vindictive or repressive nature, but rather a protective and preventive nature. If for the absolute theory *punitur quia peccatum est*, then for those who propose the positive theory *punitur ne peccetur.* The measure of the punishment will not be the offense considered objectively, but the *dangerousness* of the offender himself. The key idea is not injustice, but *antisociality.*

The many positive contributions of this theory are well known, especially for providing means to combat offenses, improve the penitential systems, promote studies on the conduct of offenders and moderate the rigidity imposed by the absolute theory. But, one must immediately note that, in the consideration of the person of the offender, there underlies a deterministic impregnation (physical and psychological features, social environment, hereditary characteristics, etc.) that is incompatible with the consideration of the entire human person, with which liberty is consubstantial.

At this time, we shall not stop to consider attempts to overcome the two extremes to which these two theories lead: mixed theories and the theory of juridical guardianship, postulated by F. Carrara, with a well-known

influence on the first canonical codification. What is of interest here for understanding the *raison d'être* of the two types of canonical penalties is to remember the tension that exists between the two extreme concepts of foundation and purpose of the penalties. If one wishes to properly state the foundation and *raison d'être* of canonical penalties, it would not be right to establish a radical separation between the bare punishment and pure medicinality, giving rise to two types of penalties that are radically different in nature. Because, just as it happened with the consequences of the theories described, this would lead to justifying *pure* repression (expiatory penalties) or to using the excessively subjectivizing penal system, that would be difficult to subject to the minimum requirements of juridical and legal security (medicinal penalties).

The response to the foundation for the existence of penalties in canon law cannot come from either one of the terms to the exclusion of the other. This is because "retribution" and "medicinality" are two concepts that, with reference to penalties, cannot be considered from the same plane. Coercion and its instrument, punishment (negative retribution for unjust behavior), look to justice and the social need for reparation (the just social order), whereas medicinality looks more directly to the *salus animarum*, a goal of a different order that is the ultimate intention and end of the system of law and that acts not as a direct operating principle, but as an inspiring principle.

Both concepts and goals, repression, or expiation, and medicinality, are involved in the justification of *ius poenale*; one may prevail, but never to the exclusion of the other. This is because, in the Church, the law can never exclude the *salus animarum*, although the "ius suum cuique tribuere" may and should appear in all its force and adequacy. Neither can the *salus animarum* dispense with the "ius suum cuique tribuere." That would mean trying to construct *charity at the expense of justice*, which would carry with it pernicious consequences in terms of unvarnished spiritualism that could easily end up in flagrant negation of the personal dignity of a member of the Christian faithful. It would omit the requirements for a minimum description of the elements of the offense and *punish* behavior not previously classified, under the pretext of a *sanctitas Ecclesiae* which should in no way be directly sought with coercive instruments.

Thus, medicinality and expiation are two concurrent elements in the justification of the canonical penal system. One cannot be stressed to the detriment of the other, unless one wants to pay the price of abandoning the juridical-penal system. Other pastoral instruments allow less regulated actions, from the *fraterna correctio* to quasi-penal measures such as *correptio* or various types of canonical penitence (see commentary on c. 1341). But, penalties have their own nature, and their content affects the concrete goods of any entity in the Christian *esse*. They cannot be used lightly for lack of sufficient discernment about their *raison d'être*, their opportuneness and their purpose.

Thus, the fact that there are medicinal penalties and expiatory penalties in canon law does not mean that there are two radically different types of penalties. That would require us to speak of two penal systems, or perhaps more properly of a penal system and a medicinal system. Instead, there are two complementary modes of reaction to offenses in which the stress falls more on medicinality or more on expiation. The stress determines different manners of imposition. One looks more to the offender, requiring the prerequisite of contumacy (a rebellious attitude of the offender when he commits the offense) and the other is more directly aimed towards restoring the juridical-social order and therefore does not consider the attitude of the offender to be as relevant. Both methods are complementary; each supports a canonical penal system in which the coercive defense of an ecclesial social order is sought as a condition and necessary environment for the integral development of the human and Christian person. They do not seek to sanctify with penal instruments, nor in the defense of the social order, do they dispense with the ultimate end pursued by Church law. In both cases, the *offense* as a clearly delineated juridical reality, objectivized through the technique of classification, is a necessary prerequisite to imposing the penalties.

Another question that should be mentioned in the attempt to understand the canonical penal system is that there is no system of administrative sanctions. In contrast to penal sanctions and involving less serious sanction content, an administrative system should allow for a different kind of action (although never absolutely discretionary) when sanctioning certain behavior that is not an offense but does harm the social order. This absence means that the penal system must be extended beyond its proper limits, thus including certain types of offenses and certain penalties that are difficult to fit into a rigorous penal system. This means *watering down* the system to a degree—interjecting impediments to a proper understanding of it and to the rigor required in imposing canonical penalties.[5]

4. *Final considerations*

Other specific questions must be treated in the commentary on the canons that follow. The points we have touched upon are sufficient to call attention to the importance of undertaking the task of divulging these general questions on penal canon law. The principal points are the following:

a) to make it clear that recourse to penalties is always *ultima ratio*;

b) in all cases and without exception, this recourse should be *oriented* toward protecting the Church's social-juridical order. It should never be understood as an *instrument* of governance to strengthen authority (a

5. Cf. Á. MARZOA, "Sanciones disciplinares y penas canónicas," in *Ius Canonicum* 28 (1988), pp 181–196.

scope that would be appropriate to administrative sanctions, not to penal sanctions) and much less as an *instrument* for sanctification;

c) the decision to impose a penalty, a decision rigorously made in accordance with cc. 1341ff, should be made with a no less rigorous knowledge of the channels of imposition and the criteria for choosing those channels together with a scrupulous respect for the formalities that must be followed;

d) the procedures to be followed upon imposing penalties (the actual steps to be taken, determination of the penalty, etc.) and upon remitting penalties (conditions, formalities with regard to the procedures followed in imposition, etc.) must be the procedures proper to law, without ambiguous or vague recourse to the sacramental internal forum;

e) when, after prudent assessment of the circumstances, it is deemed proper to impose a penalty, it should be done with all the rigor and clarity that a penal-juridical system demands, without subterfuge ill-hidden under the *particularity* of canon law, for in that case would not be such. It would instead be a defect of comprehension of the system of canon law. If *there is no other remedy* (and this should be seriously pondered), the penalty may be *imposed as it has to be imposed.* Its consequences must be assumed with the firmness that governance of the Church requires when it is trying to defend its most fundamental goods.

What about the scandals that might arise from the formalities involved in a penal procedure? The question no doubt responds to a delicate problem that must be left in the prudent hands of those who apply the law. But, to state the question in rigorous terms, perhaps we should also ask just where scandal is the most harmful. Is it in the penal stage—granting certain "disadvantages" to the necessary publicity—or in inhibition in the face of a flagrant attack on the Church's fundamental goods? Evidently, the first is the more explosive, but the second, because it is slow, is more effective in eroding the bonds of *communio* (cf. c. 205) and in the end, in damaging the sanctifying mission when it disturbs the common good necessary to the integral development of the human and Christian person.

TITULUS I
De delictorum punitione generatim

TITLE I
The Punishment of Offenses in General

INTRODUCTION

Ángel Marzoa

This title includes the two introductory general canons of book VI. The constituent principles of the penal system are condensed in these two canons (1311–1312): affirmation of the "native and proper right" that the Church has to exercise *ius coactivum* (c. 1311), and the types of penalties in effect as well as other types of sanctions that are not necessarily penal in nature (c. 1312).

In contrast to the beginning of book V of *CIC*/1917, the way penal matters are approached in *CIC* is noteworthy from the very first canons. If one looks at cc. 2195ff. *CIC*/1917, one finds that that Code opened the book *De delictis et poenis* with a definition and classification of the types of offenses, then treated the penalties in cc. 2214ff.

But, the two canons composing the first title of this book restate the Church's *ius puniendi*, then list the types of penalties and sanctions.

As is well known, the reason for this is the express wish not to include definitions in the text of the Code "because the Code is not an instruction manual, and definitions present many dangers."[1] Indeed, a code of laws is no place for definitions, nor is it the task of the legislator to define. This is a task for doctrine, in the area of juridical science, where definitions belong and where they will be extremely useful for an understanding and application of the norms, but do not involve the legislator or cause thorny problems of interpretation due to *legal definitions* (on the concepts of offense and punishment, see introduction to part I of book VI).

1. *Comm.* 16 (1984), p. 38.

1311 **Nativum et proprium Ecclesiae ius est christifideles delinquentes poenalibus sanctionibus coercere.**

The Church has its own inherent right to constrain with penal sanctions Christ's faithful who commit offences.

SOURCES: c. 2214 § 1; *LG* 8; *GS* 76; PAULUS PP. VI, Alloc., 4 oct. 1969 (*AAS* 61 [1969] 711); PAULUS PP. VI, Alloc., 4 aug. 1976; Princ. 9

CROSS REFERENCES: cc. 1312, 1321

COMMENTARY

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1. *Introduction*

The first canon of book VI states a general principle of public law: the Church is an original and independent society with its own end and the adequate means to attain it. Among these means are the power to create and enforce laws and to use penalties for offenders who violate those laws or juridical norms.[1]

This is basically what is being addressed in the first canon of book VI. Was this statement of principle necessary? Is a legal text the proper place for such a statement?

It appears that a statement of this type is more appropriate to the theory of canon law than it is to a legal text. However, the legislator wished to open book VI with words which are practically identical to those in c. 2214 § 1 *CIC*/1917.[2] One thing is clear; regardless of the technical question of whether a legal text is the proper place for such a statement, the fact is that the legislator considered it necessary. This leads us to the conclusion that the content of the canon is not being established *ad extra* (in that case, it would be more logical to have a first canon in the *CIC* with a more gene ral and comprehensive statement that also included

1. Cf. J. ARIAS, commentary on c. 1311, in *Pamplona Com.*
2. We find declarations of a similar nature in other canons of the *CIC*: cc. 747 § 1 (regarding the "munus docendi"), 1254 § 1 (regarding the jurdical-patrimonial dimension of Church), and 1260 (regarding the *ius exigendi* which assists the Church in obtaining from the faithful the necessary financial means to achieve its ends); and also confirmation of the Church's right to establish and direct schools (c. 800 § 1) and to set up universities (c. 807), in two particularly displays of how its activities co-incide with those of governments.

the exercise of the *ius coercendi)*,but rather *ad intra*. In other words, the legislator wishes to affirm positively within the Church and for the persons for whom the canonical norms are designed, that "the Church has its own inherent right to constrain ..." This clearly emphasizes that the question was not without controversy, in the very bosom of the Church, at the time of promulgation of the *CIC*

Indeed, the question of whether the Church has coercive power, especially doubts about the appropriateness of exercising it, and if it is a *potestas propria*, was raised in doctrinal discussions prior to the new codification. That is why the codification commission felt it necessary to take action and settle the question by stating the principle that no canonist can admit the suppression of penal law since *ius coactivum* is a *ius* inherent to any "perfect society," and the Church cannot waive it (*Principles* 9). The statement is repeated by the *coetus de Iure poenali*, significantly under an epigraph entitled "*Caritas et coactiva potestas*," as a universally accepted principle. The Church is a society of a supernatural order; seeking the salvation of all the faithful. It not only achieves its historical mission by generously giving of its goods, but also by placing the means for preserving them in the path to salvation and when necessary, having recourse to the appropriate remedies to avoid offenses and, when they do occur, to recover the faithful *in bonum ordinem*.[3]

Paul VI referred to this problem in a significant eloquent text, if we take into account the date he spoke (1970, at the height of the fervent doctrinal debate over the new codification): "The discussion, in the revision phase of the Code of Canon Law, remains open. All that which, for example, makes reference to warning, condemnation, excommunication, leads the delicate modern sensibility to think these matters on the verge of disappearing, as a remnant of an absolute power that today has been left behind. One cannot forget, however, that the *coercive power is directly founded on the experience of the early Church*, and that St. Paul already makes use of it in the Christian community of Corinth: the perspective of this reference suffices for an understanding of the pastoral significance of so severe a procedure, placed solely at the service of the spiritual and moral integrity of the whole Church, and for the good of the very offender: 'ut spiritus salvus sit in die Domini Nostri Iesu Christi.'"[4]

The words of the Pontiff as he touches *in recto* on the question of whether the Church has coercive power may be considered the most immediate reference for the firm conviction that motivated the codification commission and that in the end was placed in this canon.

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3. *Schema documenti quo disciplina sanctionum seu poenarum in Ecclesia latina denuo ordinatur* (Typis Polyglottis Vaticanis 1973), p. 11.

4. PAUL VI, "Discurso al Tribunal de la S. R. Romana, January 29, 1970," in *Insegnamenti di Paolo VI*, VIII (1970), p. 89 (emphasis added).

The question belongs in the continuity of canonical tradition. A comparison of the text of c. 1311 with the parallel text in *CIC*/1917 (c. 2214 § 1)[5] shows that they are practically identical, with a few small details that can be summarized as follows:

a) the phrase "independens a qualibet humana auctoritate" was deleted since it is considered to be included in the adjectives *nativum et proprium*. Perhaps in the older codification it was necessary to state it expressly, but the terms *nativum et proprium* leave no room for doubt;

b) *christifideles* instead of *sibi subditos* is used for greater precision; the Church, as a legally recognized society, may have "subjects" (subjects of canon law) who are not faithful. Considering the content and *raison d'être* of canonical penalties, they cannot be imposed upon someone who is not a member of Christ's faithful;

c) the words "penal sanctions" are used instead of "poenas spirituales et temporales." Could this mean a waiving of the imposition of temporal penalties? It appears not, for removal from an office, for example, is typically a "temporal" penalty. What they are trying to do with the substitution, technically correct, is to remit the question to where the content of penalties is systematically described (cc. 1331ff) and avoid it for the present.

2. *Coercive power of the Church according to ecclesiastical tradition*

The incontrovertible affirmation in c. 1311 is not made in a vacuum. Behind it are many pronouncements in the Church's doctrinal and disciplinary sources. Briefly, the most significant among them are:

a) In Holy Scripture, one finds numerous texts that, for content and for reference made to them subsequently by the Magisterium and by doctrine, are considered to be at the foundation of coercive powers. For example, the positive will of Christ is shown in Mt 18:15; the doctrine and practice of the Apostles as they appear in 1 Cor 4:21; 2 Cor 10:6; 13:2; 2 Thess 3:14; 1 Tim 1:20.[6]

b) The statements made by the Church's Magisterium, among which, a few of the most significant are:

— (a. 1327) John XXII (Constitution *Licet*), which condemns, among the errors of Marsilius of Padua on the constitution of the Church, the following statement: "Quod [Papa vel] tota Ecclesia simul *iuncta* [sumpta]

5. "Nativum et proprium Ecclesiae ius est, independens a qualibet humana auctoritate, coercendi sibi subditos poenis tum spiritualibus tum etiam temporalibus."

6. Cf., for the reading of these texts from the penal perspective, the monograph of J. ARIAS, *La pena canonica en la Iglesia primitiva* (Pamplona 1975).

nullum hominem [quantumcumque sceleratum] punire potest punitione coactiva, *nisi concedat hoc Imperator* [nisi Imperator daret eis auctoritatem]" (Dz.-Sch., 945);

— (a. 1415) the Council of Constance, which condemns the following statements among the errors of Wyclif: "Praelatus excommunicans clericum, qui appellavit ad regem vel ad concilium regni, eo ipso traditor est regis et regni" (Dz.-Sch., 1162); and "Nullus praelatus debet aliquem excommunicare, nisi prius sciat eum excommunicatum a Deo" (Dz.-Sch., 1161);

— (a. 1520) Leo X, which condemns the statement among the errors of Martin Luther: "Excommunicationes sunt tantum externae poenae nec privant hominem communibus spiritualibus Eccclesiae orationibus" (Dz.-Sch., 1473);

— (a. 1794) Pius VI (Constitution *Auctorem fidei*), which condemns two propositions from the Synod of Pistoia which, among other things, denied "ad eam [the Church] pertinere, exigere per vim exteriorem subiectionem suis decretis;" "Ecclesiam non habere auctoritatem subiectionis suis decretis exigendae aliter quam per media, quae pendent a persuasione" (Dz.-Sch., 2604–2605);

— (a. 1864) Pius IX (Constitution *Quanta cura*), which includes the following proposition among other errors on the Church and its rights: "Ecclesia vis inferendae potestatem non habet" (Dz.-Sch., 2924);

— cf. also, on the same subject, Leo XIII, Encyclical *Inmortale Dei* of November 1, 1885, no. 5.[7]

c) Finally, because it is the most recent, we note a text by the Roman Pontiff, released in 1979, just before the promulgation of the *CIC*: "In the vision of a Church which protects the rights of each of her faithful, but which also promotes and protects the common good as an indispensable condition for the integral development of the human and Christian person, penal discipline as well positively has a place: even the penalty threatened by the ecclesiastical authority (but which in reality is the recognition of a situation in which the subject has placed his or herself) is seen, in effect, as an instrument of communion, that is, as a means of recouping the deficiencies of the individual good and of the common good which were manifested in the anti-ecclesial, delictive, and scandalous behavior of members of the people of God."[8]

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7. Cf. for all these references P. GASPARRI-I. SEREDI, *Codex Iuris Canonici Fontes*, III, no. 592, p. 238, where these and other texts are adduced as sources confirming the power to coerce in the *CIC*/1917.

8. JOHN PAUL II, *Discurso al Tribunal de la S.R. Romana*, February 17, 1979, in *AAS* 71 (1979), pp. 422–427 (also in *Insegnamenti di Giovanni Paolo* II/1 [1979], p. 412): the Pope analyzes "the problem of the relationship between the protection of rights and ecclesial communion."

3. *Coercive power of the Church*

Among the suggestions that arose at the time of the 1973 *Schema a propos* (the text of the current c. 1311), there was one not to use the term "punish" ("nimis durum visum est verbum 'coercendi'"). What was proposed in its place was "sanctiones poenales imponendi." However, the term "punish" (*coercere*) was retained because of the long canonical tradition behind it. Therefore, it is in that term that the true meaning must be sought, and the "harshness" imputed to it is not to be found there.[9]

It was in this tradition that in the first canon of book VI the legislator wished to preserve two strictly penal terms, offender and punishment, without yielding to suggestions to "soften up" in the penal matters of canon law. The fact is that beneath those suggestions there lies hidden a confusion between *what* penal law is and *how it should be applied*. Actually, and in spite of the vagueness of the general title of book VI (see introduction to book VI, *The question of the titulus)*, its terminology is quite rigorous and precise concerning all strictly penal matters in the Liber: offense, offender, penalties, etc. This is because these are typical penal institutions, backed up by an abundant and rich doctrinal tradition that frequently has not been considered sufficiently in the critical remarks of the various prior *schemata*, and these institutions have been fully embedded in the context of juridical knowledge. The *application* of penal law is a different question, with a special effect on the Church's law. That is where "rigor with gentleness, justice with mercy, severity with mildness" belongs.[10]

To summarize: penal law *is* law. It is a reality that is not susceptible to being appreciated in terms of harshness or softness, rigor or mercy, all of which will be given by the criteria that the legislator introduces when codifying application of the law. At that point, one must address not the nature of penal law, but its application. Thus, we are remitted in the *CIC* to cc. 1341–1353, where the legislator gives consideration to the Christian faithful and their dignity in terms that are not comparable with any other penal law in state systems.

Picking up the thread of commentary on the canon, when one tries to understand coercive power in the Church, one must look to canonical tradition. The novelty of the *CIC* does not consist in *reinventing* canon law but in adapting it to the historical circumstances of the times. Although this it is a profound adaptation and not merely facelift, it cannot be seen as a negation of the fundamentals of what has been in other terms accepted and subjected to exegesis over the centuries: "The penal system

9. Cf. *Comm.* 8 (1976), p. 167.

10. *Schema documenti quo disciplina sanctionum seu poenarum in Ecclesia latina denuo ordinatur* (Typis Polyglottis Vaticanis 1973), p. 12, where the Tridentine text transcribed in c. 2214 § 2 *CIC*/1917 is listed.

which we encounter in the *CIC*/1917 and later in the *CIC* is the fruit of a development already initiated in the early years of the Church. Its substantial definition, still in force today, can already be found in the Decretals."[11]

Consequently, c. 1311 is connected to c. 2214 § 1 *CIC*/1917, which is one of its *sources*, as can be seen above. In our current specific circumstances, c. 1311 is especially in tune with general juridical tradition.[12]

In light of these considerations one may say that coercive power in the Church, in the general context of the purpose of canon law, within the framework of its proper purpose,[13] must be understood as a *potestas propria*, of external forum, with the purpose of safeguarding, or restoring, if applicable, social juridical order, as a necessary assumption for the ecclesial common good in which it is possible for an individual to realize himself as a person and as a Christian. It is a *potestas coactiva* that, when exercised, places one "in the presence of a true penal law and not in the presence of a mere eccleciastical discipline."[14]

Consequently, it is a *potestas* that has the offense as the cause for being exercised, the restoration of social order as its purpose and the anti-ecclesial (delinquent) behavior that may be derived from it as its means. Cause, purpose and means are *proper* to penal law and therefore independent in operation from any moral judgment that the behavior may merit in each specific case. The connection between the moral and penal aspect of behavior arises only, although strongly, from the subjective element of the offense (see commentary on c. 1321).

For the question of the "compatibility" between the Church's mission, the freedom of the act of faith and coercive power, see introduction to book VI, *True penal law.* For the concepts of penalty and offense, see commentaries to cc. 1312 and 1321, respectively.

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11. V. DE PAOLIS, *De Sanctionibus in Ecclesia (Adnotationes in Codicem: Liber VI)* (Rome 1986), p. 31.

12. With respect to the historical development of the canonical penal Law, one can consult, among other things, the synthesis of G. MICHIELS, *De delictis et poenis*, I, *De delictis* (Paris-Tornai-Rome-New York 1961), pp. 30–40; and subsequently to the publication of *CIC*, the more condensed work by V. DE PAOLIS, *De Sanctionibus in Ecclesia...*, cit., pp. 31–40.

13. See, for the question of the end, the introduction to book VI: "Fin del Derecho penal y fin de la Iglesia."

14. F. AZNAR, commentary on c. 1311, in *Salamanca Com.*

1312 **§ 1. Sanctiones poenales in Ecclesia sunt:**
1° poenae medicinales seu censurae, quae in cann. 1331–1333 recensentur;
2° poenae expiatoriae, de quibus in can. 1336.

§ 2. Lex alias poenas expiatorias constituere potest, quae christifidelem aliquo bono spirituali vel temporali privent et supernaturali Ecclesiae fini sint consentaneae.

§ 3. Praeterea remedia poenalia et paenitentiae adhibentur, illa quidem praesertim ad delicta praecavenda, hae potius ad poenam substituendam vel augendam.

§ 1. The penal sanctions in the Church are:
1° medicinal penalties or censures, which are listed in cann. 1331–1333;
2° expiatory penalties, mentioned in can. 1336.

§ 2. The law may determine other expiatory penalties which deprive a member of Christ's faithful of some spiritual or temporal good, and are consistent with the Church's supernatural purpose.

§ 3. Use is also made of penal remedies and penances: the former primarily to prevent offences, the latter rather to substitute for or to augment a penalty.

SOURCES: § 1: S. AUGUSTINUS, *De civitate Dei*, 21, 13; cc. 2216, 1° et 2°, 2241, 2286; PIUS PP. XII, Alloc., 3 oct. 1953 (*AAS* 45 [1953] 742–743); PIUS PP. XII, Alloc., 5 feb. 1955 (*AAS* 47 [1955] 81); PIUS PP. XII, Alloc., 26 maii 1957 (*AAS* 49 [1957] 407–408); PAULUS PP. VI, Alloc., 4 oct. 1969 (*AAS* 61 [1969] 711)
§ 2: c. 2215; *LG* 9; Princ. 3; PIUS PP. XII, Alloc. 5 dec. 1954 (*AAS* 47 [1955] 67–68); PIUS PP. XII, Alloc., 5 feb. 1955 (*AAS* 47 [1955] 78)
§ 3: cc. 2216, 3°, 2223 § 3, 3°, 2307, 2312

CROSS REFERENCES: cc. 1311, 1331–1340

COMMENTARY

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Penalties in the Church

After affirming the Church's coercive power (c. 1311), it is logical, given the organization of the subject matter, to list the instruments of this power (penalties and other punishments) (see introduction to pt. I of

book VI on the issue of medicinal and expiatory penalties in the context of the purpose of canonical penal law and justification of *ius coactivum* in general).

This canon is limited to a summary list of the coercive instruments upon which canon law may draw. A detailed description is found in title IV, *Penalties and other punishments*, cc. 1331–1340 (see respective commentaries). Let it suffice for now to emphasize that the canon sufficiently separates "penal sanctions" (§§ 1 and 2) from "penal remedies and penances" (§3). Although generally speaking, the canon refers to coercive canonical instruments, here a clear distinction is made between those that are properly *penalties* (punishment for offenses) and others ("other punishments"), which are not penalties because they do not necessarily require prior commission of offenses. They are somehow related, however, insofar as they try to prevent offenses (penal remedies) or may be used to substitute for or augment the effectiveness of a penalty.

When one looks at the *types* of penalties provided in Church law, two general questions inevitably arise: *a)* how far and how strongly these types of penalties may help the *restauratio* of the social order, which should be the purpose of a penalty (on this, see introduction to part I: *Penalties*); and *b)* to what degree that these canonical penalties are real penalties, true coercive instruments, or, what amounts to the same thing, to what point in canon law there is actual coercion and not merely an apparently feeble imitation of state laws.

a) *Restoration of a just social order*

How can an injustice be remedied? How can the social damage produced by delinquent behavior be remedied? The proper reparation for this type of injustice is the fulfillment of a penalty: "a penalty places its subject in a position of submission and humiliation directed toward correcting an attitude of defiance and rebellion against the human community."[1]

Every offense implies an attitude of defiance and rebellion against society. However, a clarification is required. It is true that in frequently committed offenses there is an element of human weakness, and this detail should not be underestimated, especially in a legal system like canon law. But neither can it serve as an excuse to *water down* an objective consideration of the damage caused by the offense.

An offense cannot be treated as something independent of the offender, but the offense is one thing and the offender is another. While they are distinguished from each other, they are not separate; it is simply that one must avoid confusing the two terms. The law is sensitive to both realities. From the point of view of the offense, considered abstractly, all mechanisms for an adequate classification and verification are established

1. J. HERVADA, *Lecciones de Filosofía del Derecho* (Pamplona 1992), pp. 294–295.

in a specific case. This is achieved through the technique of classification (see introduction to part II: *Classification*). There is, however, no offense without an offender. Therefore, the law establishes the necessary devices to "identify" who the offender is in a specific case. This is established primarily in part I, title III, "Those Who Are Liable to Penal Sanctions." This is how the law includes all the variations there may be in materially committing an offense. Thus, taking into account the particular circumstances of each case, one may or may not speak of an actual offender and, consequently, of an offense. The law adequately provides for all the subtleties that a consideration of human weakness may contribute to the fact of committing an offense. Such subtleties range from those that preclude an offense (the requirements of imputability and exonerating causes) to those that, without precluding an actual imputation of offensive conduct, still are reason not to apply the penalty in all strictness (causes that would exonerate from punishability or mitigate imputability as required for mitigating penalties).

Any offense *a se* implies an attitude of defiance and rebellion against society. Penal law looks at defiance and rebellion from its own social point of view: any offense in itself implies a "negation" of the established social order. If the community does not react against this negation, it becomes an entity within the bosom of society, bearing a heavy load of corrosiveness that affects all of society's constituent parts. At first glance, this is not about the persona of the offender but about the value of the elements that identify and constitute the very fabric of the community. The community itself is in danger insofar as, if it does not react, it would *admit* a negation of its existence to enter within. It *must* react. The reaction is to impose a penalty that "re-establishes" a just social order and reaffirms what the offense was negating. In other words, before the offender fulfills the penalty and is thus reincorporated into the social order, the act of imposing the penalty has already produced a *restauratio*.

Think, for example, of the offense of heresy, described in c. 1364. It is possible that a heretic may refuse to comply with the penalty of excommunication, but if so, the fact that the penalty is imposed, and even more so when it is announced, presupposes a *restauratio* in the bosom of the Church. From the moment that the social organization strongly rejects behavior that carries within it the seeds which will destroy its unity of faith, restoration can take place. Of course, the ecclesial community *suffers* when there is heresy, but its suffering is *cured* when a reaction is produced within the society to expel the person who tries to become an arbiter of truth therein and who places himself above the binding power of the ecclesiastical magisterium. Before penalties are imposed, other types of reaction are possible; therefore, the prudent legislator decrees that all possible means of forcing the alleged offender to renounce that defiance and rebellion be first exhausted (cf. c. 1341). But, in some cases imposition of a penalty (*ultima ratio*) will be the only means of restoring the disturbed order.

Naturally, restoration will be complete ("perfect" must be understood here in the context of the scope of the law, in other words as far as the law tries to reach) when, in addition, the offender reacts positively, and the penalty motivates him to renounce his attitude and rectify his conduct ("medicinal" penalties especially try to reach this point). But, even if restoration is incomplete, the penalty still has accomplished its purpose.

The ambiguity surrounding the term "restoration" should be eliminated. "Restore" does not mean "re-create," as if offensive behavior could, through a penalty, be placed in an imaginary "time machine" and in some way the situation prior to the commission of the offense could return. Restoration is not an attempt to "re-create" the just social order as if it had not been disturbed. What is being restored is nothing more than what can be restored. A penalty can never restore to life the victim of murder. What it can do, and this is the scope we mentioned, is to restore the climate of security and therefore of protection for the rights of the members of the community.

If every offense is a legal injustice (materially, an offense may also have other dimensions of injustice, but they are not within the scope of legal justice, which is the proper scope of penal law), with respect to legal justice, imposing a penalty thus produces restoration or re-establishment of a just social order. To claim otherwise from the point of view of the law is to claim that it is impossible, or in other words, that it is an absurdity.

b) *Coercive force and penal force of canonical penalties*

In considering the penalties described in this canon, one reaches a question that was debated at length in the discussions on the nature of canon law. In light of "penalties" such as those described in cc. 1331–1340, can one speak of true coercion in canon law?

If one of the parameters of coercion is the deprivation of liberty, and the use of physical force in general, the response will obviously have to be negative. However the issue is really whether physical force and coercion are necessarily one and the same. Thinking that they are the same is what is behind some stances against the juridicity of canon law, and it is also what has caused several problems in understanding the nature of the law of the Church, principally in the last two centuries.[2]

Coercion is not the same as the feasibility of having recourse to physical force. Basically, that would be to reduce men to the level of pure animality; physical punishment is not the only way to "coerce" a human being. Coercion is not necessarily linked to the physical deprivation of liberty or to physical force. Under canon law, there is no possibility of deprivation of physical liberty, of prison, nor of any other similar type of material coercion, but there is *privation*, and that concept is essential to

2. A clear summary of the question can found in P.J. VILADRICH,"El Derecho canónico," in *Derecho canónico*, I (Pamplona 1974), pp. 48–49.

coercion. Therefore, there is no deprivation of liberty as there is in state social organizations, but there is deprivation of the goods required to be *free* in the Church so as to be able to be a member of the Church. Coercion as deprivation of goods that, while spiritual, are realized temporally, is at least as coercive and penalizing as deprivation of physical liberty. The effectiveness of deprivation will depend upon the interest for the Christian faithful in that liberty or in the goods required for realization, but this could occur as much in the deprivation of the sacraments as in jail. The fact that an offender cared so little about liberty as to subjectively consider being jailed as no penalty cannot be considered as ineffectiveness or absence of coercion.

If one reduces the possibility of exercising real coercive power to the physical possibility of deprivation of liberty, one would have a reductionist view of man, in which the only value was liberty of movement. The Church possesses real coercive power, inasmuch as the goods that it takes away are more intensely desired and more necessary to the Christian faithful than liberty of space and movement because the goods are necessary to aspire to the real liberty of the children of God. This is the highest concept of liberty ever expressed. Therefore, it has rightly been stated that canon law has within it stronger coercive powers than does the state. In this sense, canonical penalties (medicinal or expiatory) are more than sufficiently coercive. Within Church law *his in terris*, we may quite properly speak of true coercive power.

TITULUS II
De lege poenali ac de praecepto poenali

TITLE II
Penal Law and Penal Precept

INTRODUCTION

Josemaría Sanchis

1. Certain specific aspects of *penal* law and *penal* precept are regulated in the canons under title II. They concern the laws and precepts that establish or threaten a penalty against those who violate the juridical or imperative behavioral obligation (mandate or prohibition) described therein.[1] Law and precept are the juridical instruments by which to determine the different unjust types of behavior that may be punished and the penalties to impose upon those who commit offenses. Thus, penal law and penal precept (and only these two, therefore excluding custom) are the formal *constituent* sources of offenses, insofar as they indicate which behaviors are considered delinquent and will thus incur the penal sanction established therein. Therefore the specific element that characterizes penal norms is the sanction that they mandate. Along with the penalty, the norm must also precisely describe the behavior to be punished and that which constitutes the offense. This task is called *typificatio* (see commentaries to cc. 1321 and 1399 on the meaning and function of penal norms in determining the canonical concept of offense).

2. These penal norms are only ecclesiastical norms (cf. c. 11) in the sense that although "the Church has its own inherent right to constrain with penal sanctions Christ's faithful who commit offenses" (c. 1311), and offensive behavior is frequently unjust because it is a violation of divine law (natural or positive). Still, the decision to impose a penalty for certain behavior is, in the final analysis, always made by an ecclesiastical official.

3. The nature of penal law causes no special difficulties. It is the means by which the legislator promulgates perpetual, permanent or stable common prescriptions that have as their passive subject a community with the ability to receive a law and that is therefore a general and

1. Cf. J. SANCHIS, *La legge penale e il precetto penale* (Milan 1993).

abstract addressee. In its more general aspects, the juridical system of penal law is common to every other type of law. It is principally regulated by cc. 7–22. In these canons, certain particular dispositions are established that are traditional in the canonical system law and specific to penal laws. Those particularities that evidence great respect for human dignity and for the Christian faithful are typical of Church law. They tend to guarantee the most basic fundamental rights, which might be affected by the discipline of sanctions and seriously violated if sanctions are not applied with a lively sense of justice and in strict obedience to the law. Among these norms are ones that establish a strict interpretation of penal laws (c. 18); prohibit the use of analogy if there is no express prescription in the law on a given penal matter (c. 19); and expressly exempt the case where the person breaking the law or precept was guiltless in his ignorance (inadvertence and error are equivalent to ignorance) that he was breaking a law or disobeying a precept, or extenuate only if he did not know that the law included a penalty (cc. 1323,2° and 1324 § 1,9°, respectively). Ignorance is never presumed by the law or by the penalty (c. 15 § 2).

Furthermore, in c. 87 § 1, penal laws issued by the supreme authority of the Church are excluded from the powers of dispensation enjoyed by a diocesan bishop.

4. With regard to determining the nature of the penal precept, doctrine is not unanimous. According to the norms in the Code, c. 49, which is included in the title on singular decrees and precepts, considers a precept to be a type of decree, an administrative act, that may be issued by anyone with simple executive power (cf. c. 48) and "by which an obligation is directly and lawfully imposed on a specific person or persons to do or to omit something, especially in order to urge the observance of a law."

The discussion on the nature of a penal precept is part of the greater issue of the nature of precepts in general. The question is whether a precept simply requires the law to be obeyed (if so, a precept would be an administrative act) or whether the precept can also fulfill an innovative function in the legal system by threatening obligations that are not present in the law. In the latter case, a precept is, or could be, a singular norm proper to legislative power.

Some authors[2] see the threatening of penalties as an innovating act in the law. They think that it creates objective law and therefore is a typical activity of the legislative power, which by its very nature can only be wielded by those with such powers. Therefore, a precept that threatens a penalty, a penal precept, cannot be considered a simple precept or an administrative act, but a singular norm that can only be issued by a legislator.

2. Principally P. LOMBARDÍA, *Lecciones de Derecho Canónico* (Madrid 1984), p. 165 and J. ARIAS, "El precepto canónico como norma jurídica o como acto administrativo," in *Revista Española de Derecho Canónico*, 39 (1983), pp. 228–229.

However according to the most common opinion,[3] a penal precept is only a type of the precept established in c. 49. Its essential aspects are regulated by cc. 35–38, which refer to special administrative acts, specifically to decrees and special precepts. In other words, these authors understand that, by use of the precept, the executive power may not only threaten and determine the content of the law, but may also create, modify and extinguish subjective juridical situations for a specific case, provided that it has been given the power to do so by law and that it is subject to the law.

Therefore, every precept, including a penal precept, is an act that is administrative in nature because it is to the executive authority that the law attributes the power to threaten penalties for specific cases by means of precepts. In fact, c. 36 § 1 explicitly permits administrative acts that threaten penalties, and c. 1319 establishes the principle that anyone who can impose precepts in the external forum may also give penal precepts. It implicitly remits to general norms in matters of the juridical system of the precepts. The content of a penal precept consists of a positive (mandate) or negative (prohibition) order, whether or not previously established by law, with the threat of a penalty.

This is also a *singular* act or precept, "imposed on a specific person or persons." Therefore, the intended person can be an individual or several persons, but specific, clearly distinguished, and considered as individuals.

5. A penal precept may both determine and constitute an offense. The principal function of a penal precept is to determine more specifically the author of the offense or the penalty provided by penal law. In other words, a penal precept does not normally constitute a new offense but simply more clearly defines some of its aspects. The reason is that, because the situations and persons are specific and predetermined, the various factors and specific circumstances of the case may more easily be taken into account. However, it is possible that a penal precept may create or constitute a new offense that was not previously described or classified by a law, but only with respect to the specific person or persons for whom it was issued.

6. A penal precept is mainly personal in nature (cf. c. 52) and tends to be transitory or temporal. In other words, it is justified by unexpected or emergency situations (such as the one included in c. 1399) that demand swift and precise action. After those circumstances have disappeared, it is advisable to revoke the penal precept, or, if it is appropriate, to replace it with a law.

7. The Code apparently explicitly provides only for *singular* precepts. However, some authors consider that there are no doctrinal or legal

3. For a direct study of the question E. LABANDEIRA-J. MIRAS, "El precepto penal en el *CIC*," in *Ius Ecclesiae*, 3 (1991), pp. 671–690.

reasons to preclude *general* precepts, and therefore also *general penal precepts*, that threaten to fail to fulfill a juridical obligation. The issue has been studied very little, but a number of authors consider that a penal precept may only be particular, since general precepts are identified with the law[4] and would not be justified in a penal system. However, considering that there is no clear distinction in current norms, as would be desirable, between disciplinary and penal areas and thus between disciplinary and penal sanctions, it seems undeniable that the general norms of ecclesiastical administration (executory decrees, executive decrees and instructions, regulated in cc. 31–34) may establish disciplinary sanctions, as in fact actually occurs.[5]

Therefore, in the current canon penal law, there is in fact no "reserve of law." Perhaps it would have been better to reserve the constitution of penalties to the legislator and leave for the executive authority a more specific determination, by means of precept, of the offense and/or the penalty established by law.

4. Cf., e.g., A. BORRAS, *Les sanctions dans l'Église* (Paris 1990), p. 58 and A. MARZOA in *Manual de Derecho canonico* (Pamplona 1988), p. 696.

5. Cf. Secr. St. Instr. *Secreta continere*, February 4, 1974, regarding the pontifical secret, in *AAS* 66 (1974), pp. 89–92, and RGCR, arts. 70–85.

1313 **§ 1. Si post delictum commissum lex mutetur, applicanda est lex reo favorabilior.**

§ 2. Quod si lex posterior tollat legem vel saltem poenam, haec statim cessat.

§ 1. If a law is changed after an offence has been committed, the law more favourable to the offender is to be applied.

§ 2. If a later law removes a law, or at least a penalty, the penalty immediately lapses.

SOURCES: § 1: cc. 19, 2219 § 1; 2226 § 2
§ 2: c. 2226 § 3

CROSS REFERENCES: cc. 6 § 1,3°, 9 et 20

COMMENTARY

Josemaría Sanchis

1. With respect to the efficacy of law in time, c. 9 establishes the general principle that "laws concern matters of the future, not those of the past, unless provision is made in them for the latter by name." This means that laws are theoretically not retroactive. In the specific case of penal laws, it means, among other things, that a penalty shall be applicable to acts committed after the law comes into effect, not to acts committed before that time.

However this canon establishes some exceptions to this general principle regarding penal laws. In particular, it includes cases in which penal law should be applied retroactively to actions committed prior to the effective date of the law.

2. Paragraph 1 refers to the law that is to be applied when the law has changed since the offense has been committed. In those circumstances, the law most favorable to the offender will be applied.

These are the requirements for such a case:

a) that the action be considered an offense under the penal law in effect at the time of commission. Otherwise, if at the time of the action there was no law threatening a penalty against such behavior, a law that later considers it to be delinquent and establishes a penalty for it cannot be applied retroactively. In this case, it is not the principle of the most favorable law that is applied, but strictly the principle of the non-retroactivity of penal law;

b) that there be a change in the law after the commission of the offense. Modification or change in the law refers to the delimiting aspects of the delinquent act, the requirements or conditions for punishablity, or the nature or scope of the penalty. However, it must be a simple change and not an abrogation of the law because, in this last case, the provisions of the second paragraph of the canon would apply;

c) that the penalty for the offense committed shall not yet have been applied. If the penalty *has* been applied (whether because it was a *latae sententiae* penalty which the delinquent automatically incurred at the moment of committing the offense, or because it was a *ferendae sententiae* penalty and the execution of the sentence or decree inflicting the penalty was mandated), it is impossible to apply a different law, because the law in effect at the time of deciding the case has already been applied. However, revocation of the executory decree of sentence or the decree imposing the penalty may be requested, citing the change in penal law.

3. In cases where all of these requirements are met, the juridical principle is applied that guarantees the offender the most favorable treatment among those provided by the various laws from the time of committing the offense. It is possible that the offense may carry the retroactive effect of the later penal law because it is the most favorable.

The text of the canon refers to the *lex reo favorabilior* (i.e., the law that, taking into account the various requirements established therein, is the most favorable to the offender). Thus it is not merely the law that imposes a lesser penalty. A greater penalty could be more favorable, insofar as it implies that the case is not punishable due to stricter requirements. It could also be considered more favorable, for example, if a later law provides that the offense be punished with a penalty applied *ferendae sententiae* instead of *latae sententiae.*

4. On the other hand, § 2 refers to one of the effects of an abrogation of penal law. Abrogation of a penal law may take place with the elimination of an imperative juridical obligation of behavior, with a violation thereof a delinquent action is committed. Abrogation of penal law may also occur with simple elimination of the penalty, since the defining characteristic of penal law is the penalty it establishes (the text reads "tollat legem vel saltem poenam"). The norms that regulate the abrogation of laws are found in c. 20, which specifies when a later law abrogates or derogates from an earlier law.

These are all cases that assume depenalization, meaning that, for various reasons, the competent authority no longer considers it appropriate to punish the conduct and that henceforth it will not be an offense. Depenalization does not necessarily imply that such behavior ceases to be illegal or antijuridical and obviously does not prejudge whether it is moral. It simply means that, given the specific circumstances of time and place, it is understood that the purposes of the penalty and the guardianship of the

juridical goods involved may be obtained by non-penal means. It is no longer necessary or fitting to go to the extreme of a penalty. One must not confuse a description of behavior as juridical-penal with a moral judgment, or confuse an offense with a sin. Furthermore, classifying offenses does not consist of making a list of sins with all possible antijuridical actions. Just as it is possible to constitute or "create" an offense, it is also possible to depenalize it. In fact, when the Code took effect, all universal or particular penal laws promulgated by the Holy See were abrogated, with the exception of those included in the Code itself (c. 6 § 1,3°).

According to the letter of this canon, the principal effect of abrogation of a penal law is the immediate cessation of the penalty imposed under it. However, whereas in some cases this causes no particular difficulties, either theoretically or practically, in other cases it does not appear that this effect may be applied as readily. This is especially true if the penalties are perpetual expiatory penalties, such as expulsion from the clerical state or deprivation of or removal from office. In any case, the spirit of the norm appears to be clearly expressed in the canon.

1314 **Poena plerumque est ferendae sententiae, ita ut reum non teneat, nisi postquam irrogata sit; est autem latae sententiae, ita ut in eam incurratur ipso facto commissi delicti, si lex vel praeceptum id expresse statuat.**

A penalty is for the most part *ferendae sententiae*, that is, not binding upon the offender until it has been imposed. It is, however, *latae sententiae*, so that it is incurred automatically upon the commission of an offence, if the law or precept expressly lays this down.

SOURCES: c. 2217 § 1,2° et § 2; Pius PP. XII, Alloc., 5 dec. 1954 (*AAS* 47 [1955] 64); Princ. 9

CROSS REFERENCES: cc. 1335, 1336 § 2, 1338 § 3, 1341, 1342, 1352, 1357, 1717–1728

COMMENTARY

Josemaría Sanchis

1. This canon gives the distinction between *ferendae sententiae* and *latae sententiae* penalties, based on how they are imposed. Canonical penalties are generally *ferendae sententiae*. This means that the normal method of applying them is by a sentence from a judge or a decree from a superior, following a penal procedure (judicial or administrative, depending on the case) to obtain juridical certainty that there was an offense and to ascertain the author's guilt. Juridical certainty is needed to impose the penalty justly (cf. cc. 1341–1342 and 1717–1728). It only then that the penalty obligates the offender. Exceptionally, where law or precept so expressly provides, some penalties (because of their nature, expiatory penalties referred to in c. 1336 § 2 are excluded) are applied *latae sententiae*. This means they are incurred *ipso facto* by the very fact of the offense having been committed.

2. The *latae sententiae* method of applying penalties is exceptional because of its particular characteristics, mainly how difficult it is, in observing the effects of the penalty, to coordinate the internal and external fora, especially if one considers that a canonical penalty, *natura sua*, is a juridical institution proper to the external forum.[1] Thus, in no. 9 of the "Directive Principles for the Reform of the Code of Canon Law" reads: "The

1. Cf. the opinion of J. ARIAS, "Las penas 'latae sententiae': actualidad o anacronismo," in *Diritto, persona e vita sociale. Scritti in memoria di Orio Giacchi* (Milan 1984), II, pp. 5–27.

general tendency has been to employ *ferendae sententiae* penalties, imposed and remitted in the external forum. As far as *latae sententiae* penalties are concerned, despite the fact that many have proposed their abolition, the tendency has been to limit them to small number of cases, and what is more, to a select few of the gravest offenses."[2]

3. For the reasons indicated, in the Code, penalties applied *latae sententiae* are subjected to a particular juridical system that inevitably tends to confuse offenses with sins, penalties with penitence and, all things considered, juridical-penal order with moral order. This because, in such cases, the effects of the penalty, and its possible remission, take place in the internal forum (personal conscience), since in most cases the offense, and especially the penalty, remain hidden, or there is no record in the external forum that it was effectively imposed.

4. It is only in appearance that a penalty is automatically incurred for committing an offense when a *latae sententiae* penalty is mandated. In such cases, the conditions of punishability are logically much stricter than in normal circumstances, where the penalty is applied by sentence or decree, since the person who has committed the offense should judge himself. Any of the attenuating causes listed in c. 1324 § 1 (e.g., non-culpable ignorance of the penalty, described at no. 9) is a reason that the person who committed the offense will not incur the penalty (cf. c. 1324 § 3). If the penalty is incurred, its effects, however, are explicitly limited (cf. cc. 1331, 1332, 1333 § 3,3°, 1334 § 2), mainly to contain them within the internal forum. In addition, codical legislation provides for various circumstances in which the obligation to observe the effects of *latae sententiae* penalties is suspended (cf. cc. 1335, 1338 § 3, 1352). The general principle governing here is that there is an obligation to fulfill a *latae sententiae* penalty but, if it has not been declared or is not notorious in the place where the offender is located, then it is partially or totally suspended, insofar as it cannot be fulfilled without danger of serious scandal or disgrace (c. 1352 § 1). It has also been necessary to provide for exceptional cases of remission of the penalty in the internal forum, normally sacramental (cf. cc. 508, 1357).

5. After commission of an offense, if the mandated penalty is *latae sententiae*, it may also be handled *ferendae sententiae*, that is, *declared* by sentence or decree. In such a case, the penalty will become fully effective from that moment. However, the sentence or decree can be declared only in cases where the penalty has been incurred *ipso facto*, and this does not always happen, even though the offense has been committed. In other cases, the declarative sentence or decree will be constituent of the penalty.

2. *Comm.* 1 (1969), p. 82.

6. The fact that *latae sententiae* penalties remain in the Code is due to their principally pedagogical and dissuasive function. By appealing to the conscience of the faithful, they warn them of the gravity of the offense and of its consequences. In this sense, such penalties fulfill a relevant function, especially now that the Church's penal law is almost exclusively limited to the automatic application of penalties, with very few cases of penal process.

1315 **§ 1. Qui legislativam habet potestatem, potest etiam poenales leges ferre; potest autem suis legibus etiam legem divinam vel legem ecclesiasticam, a superiore auctoritate latam, congrua poena munire, servatis suae competentiae limitibus ratione territorii vel personarum.**

§ 2. Lex ipsa potest poenam determinare vel prudenti iudicis aestimatione determinandam relinquere.

§ 3. Lex particularis potest etiam poenis universali lege constitutis in aliquod delictum alias addere; id autem ne faciat, nisi ex gravissima necessitate. Quod si lex universalis indeterminatam vel facultativam poenam comminetur, lex particularis potest etiam in illius locum poenam determinatam vel obligatoriam constituere.

§ 1. Whoever has legislative power can also make penal laws. A legislator can, however, by laws of his own, reinforce with a fitting penalty a divine law or an ecclesiastical law of a higher authority, observing the limits of his competence in respect of territory or persons.

§ 2. A law can either itself determine the penalty or leave its determination to the prudent decision of a judge.

§ 3. A particular law can also add other penalties to those laid down for a certain offence in a universal law; this is not to be done, however, except for the gravest necessity. If a universal law threatens an undetermined penalty or a discretionary penalty, a particular law can establish in its place a determined or an obligatory penalty.

SOURCES: § 1: cc. 2220 § 1, 2221
§ 2: c. 2217 § 1,1°
§ 3: c. 2221

CROSS REFERENCES: cc. 135, 1343–1346, 1349

COMMENTARY

Josemaría Sanchis

1. This canon begins by establishing in § 1 the general principle by which anyone with legislative power (proper or delegated, cf. c. 30) may also, as is logical, make penal laws. Therefore, no unipersonal organ (the Roman Pontiff, diocesan bishop and equivalents, etc.) or member of a college (College of Bishops, particular Council, bishops' conference) enjoying legislative power in the Church is excluded from making laws that

establish canonical penalties. This is to say that those persons may create or constitute new offenses, naturally while respecting the limits of their competence, be it material, territorial or over persons.

During the work of drawing up the Code, to avoid any rigorous interpretation or excessive diversity in penal legislation, it was proposed to limit this power and confer it solely upon the bishops' conferences.[1] But, the answer to this suggestion was that, in that case, the power of the bishops would be too restricted.[2]

2. The juridical obligation being mandated or the juridical good that the new penal law proposes to safeguard may be contained in the provisions of various types of law: divine law, natural law (in the Code, for example, offenses against the life and liberty of human beings are described in cc. 1397–1398), positive law (cf., for example, offenses in the administration of the sacraments in cc. 1378–1380) and human law (cf., for example, c. 1392, which classifies engaging in commerce by the clergy or the religious as an offense). A human law may be ecclesiastical, promulgated by the ecclesiastical legislator or by other, normally superior, legislators, or it may be a law issued by civil authorities.

3. Penal law and penal precept may make imposition of the threatened penalty obligatory (*preceptive* or *obligatory* penalty). They may also give the judge (or superior) the power to apply or not apply the penalty (*facultative* penalty), in which case the person applying the penalty must follow the provisions of cc. 1343–1346.

4. As provided in § 2 of this canon, the law that establishes the penalty may precisely determine the penalty (*determined* penalty) or leave it to the prudent judgment of the judge to determine, with a greater or lesser margin of discretion (*undetermined* penalty). The judge should particularly keep in mind the norm in c. 1349. By their very nature, *latae sententiae* penalties are always determined.

The number of undetermined penalties in the Code is excessive. Although they allow the judge to apply the most appropriate penalty to the circumstances of the person and the offense, they also weaken the preventive effect of the penalty and may cause unequal and unjust treatment of the faithful and lead to arbitrary action by the judge or the superior who must apply them. In canon law, however, undetermined penalties are more easily justified, because they are universal norms and cannot take sufficient account of the varied circumstances and particularities of each of the places where they must be applied.

5. Particular legislative activity in penal matters does not refer only to the possibility of creating an offense *ex novo* with a penal law. One of the tasks of particular legislation is to accommodate universal legislation

1. Cf. *Comm.* 7 (1975), p. 97
2. Cf. *Comm.* 8 (1976), p. 171

to the specific circumstances of a place. In penal matters, one way to accomplish that is explicitly provided in § 3 of this canon: "If a universal law threatens an undetermined penalty or a discretionary penalty, a particular law can establish in its place a determined or an obligatory penalty." In addition, the particular legislator may also add other penalties to those established for an offense by the law of a superior legislator. Given the characteristics and function proper to penalties, this canon warns that "this is not to be done except for the gravest necessity."

1316 **Curent Episcopi dioecesani ut, quatenus fieri potest, in eadem civitate vel regione uniformes ferantur, si quae ferendae sint, poenales leges.**

Diocesan bishops are to take care that as far as possible any penalties which are to be imposed by law are uniform within the same city or region.

SOURCES: *LG* 27; *CD* 36, 37

CROSS REFERENCES: c. 1315

COMMENTARY

Josemaría Sanchis

By including ample recognition for the legislative power in the area of penalties in the preceding canon, the Code attempts to set down the basis for suitably adapting penal legislation to the most varied circumstances of time and place. Although this should theoretically be considered a positive factor and is the fruit of attentive and responsible pastoral exercise of power, such variety may cause problems.

While preparing the *schema* of penal law, some consultative bodies indicated that it was appropriate to avoid excessive variety and fragmentation of territorial penal norms. To that end, it was suggested that competence to make penal laws be granted exclusively to the bishops' conferences. Since this suggestion was not accepted (see commentary on c. 1315), the drafting group thought it opportune to include the contents of this canon.[1]

Indeed, while the convenience and usefulness of particular penal norms is acknowledged, the diocesan bishop and all those with power to issue penal laws are exhorted to observe a degree of uniformity in the matter, at least within certain territorial limits (the same city or region).

Uniformity is especially advisable to avoid perplexing the faithful and to prevent possible abuse by the authorities. In other words, in a matter as serious and delicate as this, it is particularly appropriate for the authority to act with uniform criteria to avoid possible abuses and to ensure equal treatment. In this way, the faithful will not be surprised to see that, in some places, certain acts are punished as delinquent, while in others

1. Cf. *Comm.* 8 (1976), p. 172.

nearby, perhaps neighboring, they are not, or that in some places, heavy penalties are applied, and in others, for the same behavior, much lighter penalties are imposed.

Since a bishops' conference cannot offer a complete and uniform set of norms on penal matters because its competence is materially limited, this may be achieved in other ways, decisions of such as particular councils and agreements between neighboring diocesan bishops. In any case, the path to making agreements is open at sessions of a bishops' conference, as provided in c. 455 § 4.[2]

However, diversity per se cannot be rejected.[3] In light of diversity of circumstance, social sensitivity and other factors, the competent ecclesiastical authorities should carefully and prudently ponder the matter with pastoral responsibility, and decide what would be best.

2. Cf. J. SANCHIS, "Organi collegiali competenti ad emanare leggi penali. Particolare riferimento alle Conferenze iscopali," in *L'Année Canonique*. Hors série. *La Synodalité. La participation au gouvernement dans l'Église*. Actes du VII congrès international de Droit Canonique, Paris September 21–28, 1990, I, pp. 507-516.

3. Cf. V. DE PAOLIS, *De sanctionibus in Ecclesia. Adnotationes in Codicem: Liber VI* (Rome 1986), p. 52.

1317 **Poenae eatenus constituantur, quatenus vere necessariae sint ad aptius providendum ecclesiasticae disciplinae. Dimissio autem e statu clericali lege particulari constitui nequit.**

Penalties are to be established only in so far as they are really necessary for the better maintenance of ecclesiastical discipline. Dismissal from the clerical state, however, cannot be laid down by particular law.

SOURCES: cc. 2214 § 2, 2303 § 3, 2305 § 2; *LG* 27

CROSS REFERENCES: cc. 392, 1319, 1336 § 1,5°

COMMENTARY

Josemaría Sanchis

1. This canon states the general criteria for establishing canonical penalties.

To achieve its purpose, the Church also has penal sanctions as legitimate and necessary juridical-pastoral instruments. However, for pastors, when exercising their power of governance, recourse to the use of penalties should be the exception. As the Council of Trent (Session XIII, *de ref.*, ch. 1) states and c. 2214 § 2 of *CIC*/1917 briefly mentioned, example, exhortation, and persuasion, should be the ordinary means to prevent offenses and, above all, to lead the faithful by the correct and ordered exercise of the freedom they enjoy in the Church to attain salvation and edification from the Body of Christ. Canonical penalties are certainly not the most important instrument in pastoral governance, not even to encourage observance of the more serious obligations of justice for the faithful. But, this does not mean that canonical penalties are not appropriate, and necessary, in the face of certain behavior. However, it must be remembered that the effectiveness and proper function of canonical penalties has a double dimension: personal and social. This means that it looks to the personal good of the faithful and to the general and common good of the people of God. In this sense, the purpose of canonical penalties, in which the Church's entire penal system plays a part, is the guardianship of communion. Thus it is a defense of the bonds and goods upon which communion is founded: faith, the sacraments and the ecclesiastical regimen.

2. As the fundamental pastoral criterion in this matter, the canon provides that penalties should be established, meaning laws and penal precepts should be made, only when they are truly necessary to better

provide for ecclesiastical discipline. In order to judge the appropriateness or necessity of mandating a penalty for certain behavior, an authority may make use of the opinion of consultative bodies formed at various levels of the ecclesiastical organization.

Canon 392 explicitly alludes to ecclesiastical discipline when it notes that a diocesan bishop is obligated to defend the unity of the Church and therefore, to promote the discipline common to the entire Church, as established in laws and other ecclesiastical norms. Therefore, he should be vigilant to prevent the introduction of abuses, particularly in matters of special importance, such as the ministry of the word, the celebration of the sacraments and divine worship, and the administration of goods. Indeed, all canonical penalties tend to defend these fundamental goods and interests of the Church.

3. The last part of the canon prohibits mandating the expiatory penalty of expulsion from the clerical state by particular law. Literally, the canon reads, "Dismissal from the clerical state, however, cannot be laid down by particular law." But, the expression "particular law" is understood in the sense of a law made by a legislator under the supreme authority (Roman Pontiff and College of Bishops). This is because, in addition to universal norms, the supreme authority also may make particular norms for a given territory or a specific ecclesial community. It does not appear that with this canon the supreme authority wanted to impose limitations on its own power by prohibiting itself from making particular laws that mandate expulsion from the clerical state. In addition, the canon refers explicitly only to "law." As for "precept," c. 1319 § 1 provides that perpetual expiatory penalties such as expulsion from the clerical state cannot be mandated by precept. It must also be made clear that, in this case, there is nothing to prevent the supreme authority from imposing a precept under penalty of expulsion from the clerical state. Finally, this provision is nothing other than a concrete application of the juridical institution of reserve. Because of the gravity of the penalty of expulsion from the clerical state, the supreme authority wanted to reserve for itself the possibility of establishing it against some offense.

1318 **Latae sententiae poenas ne comminetur legislator, nisi forte in singularia quaedam delicta dolosa, quae vel graviori esse possint scandalo vel efficaciter puniri poenis ferendae sententiae non possint; censuras autem, praesertim excommunicationem, ne constituat, nisi maxima cum moderatione et in sola delicta graviora.**

A legislator is not to threaten *latae sententiae* penalties, except perhaps for some outstanding and malicious offences which may be either more grave by reason of scandal or such that they cannot be effectively punished by *ferendae sententiae* penalties. He is not, however, to constitute censures, especially excommunication, except with the greatest moderation, and only for the more grave offences.

SOURCES: c. 2241 § 1; Princ. 9

CROSS REFERENCES: cc. 1312, 1314, 1321, 1331

COMMENTARY

Josemaría Sanchis

1. In this canon, the supreme legislator gives those who may make penal laws or impose penal precepts some criteria for the establishment of *latae sententiae* penalties and the constitution of censures or medicinal penalties.

Taken by themselves, these are simply directives that have limited practical relevance. If they are not taken into account by lower ecclesiastical authorities when issuing these norms, the norms would not be null or without effect. However, in the case of a precept, failure to observe these criteria could be a sufficient reason for legitimate impugnment. In any case, some provisions of this canon have a precise and direct juridical effect.

2. With regard to *latae sententiae* penalties, the general principle is not to establish them (*ne comminetur*), because this method of applying canonical penalties should be considered exceptional. Therefore, it should be limited to very few, very concrete, specifically determined offenses (*singularia quaedam delicta*). Thus in the overall canonical penal system, they are not the normal way to apply penalties. Threatening a *latae sententiae* penalty is justified only if it simultaneously meets the conditions of the assumption and at least one of the two circumstances stated in the canon. The assumption is that it must necessarily be an

outstanding and malicious offense, meaning a deliberate violation of a penal norm (cf. c. 1321 § 2). This assumption must be understood to mean that *latae sententiae* penalties cannot be threatened (constitutive moment) against culpable offenses, just as *latae sententiae* penalties are not incurred (applicative moment) when the offense was committed by omission of due diligence, that is to say, with culpability.

3. Since a necessary assumption is that the offense be malicious, a *latae sententiae* penalty may be threatened after verifying either of the following circumstances: the offense may cause a greater scandal or it cannot be effectively punished with *ferendae sententiae* penalties.

It is not easy to precisely determine the significance and scope of these two circumstances. They must be considered at the time of threatening the penalty, that is, at the time of making the penal norm and therefore, before the offense is actually committed.

The first of these circumstances implies that the ecclesiastical authority, with timely and prudent care for the good of souls, should foresee the offenses that may cause greater scandal among the faithful. These are the offenses that, because of their objective gravity and the circumstances and social sensitivity of the environment in which they occur, may cause discredit to the Church or its teachings and means of salvation (the sacraments) or create among the faithful an attitude that might induce offensive behavior.

The second circumstance that may justify threatening a *latae sententiae* penalty is that the offense cannot be effectively punished with a *ferendae sententiae* penalty. The only offenses that cannot be punished with *ferendae sententiae* penalties are those that theoretically cannot be proved in the external forum except by confession of the author; then, it is not possible to initiate a penal procedure. Nevertheless, it seems that the determining element in choosing between the modes of applying the penalty is the hypothetical ineffectiveness of the *ferendae sententiae* penalty, not the real possibility of applying it by sentence or decree. But, it is uncertain whether a *latae sententiae* penalty is more effective than a *ferendae sententiae* penalty unless, for some offenses, the *latae sententiae* penalty is more effective in practice, from the point of view of prevention, because if it were *ferendae sententiae*, it would, in fact, not be applied. In sum, this is an attempt to find the most appropriate and effective means to combat certain delinquent actions.

4. With regard to censures or medicinal penalties, the general criterion on constituting them is very restrictive. The canon states that the ecclesiastical authority theoretically shall not establish (*ne constituat*) them except with the greatest moderation—a criterion of maximum restriction for the gravest of censures, excommunication. Censures, in the final analysis, should be reserved only for the most grave offenses.

1319 **§ 1. Quatenus quis potest vi potestatis regiminis in foro externo praecepta imponere, eatenus potest etiam poenas determinatas, exceptis expiatoriis perpetuis, per praeceptum comminari.**

§ 2. Praeceptum poenale ne feratur, nisi re mature perpensa, et iis servatis, quae in cann. 1317 et 1318 de legibus particularibus statuuntur.

§ 1. To the extent to which one can impose precepts by virtue of the power of governance in the external forum, to that extent can one also by precept threaten determined penalties, with the exception of perpetual expiatory penalties.

§ 2. A precept to which a penalty is attached is not to be issued unless the matter has been very carefully considered, and unless the provisions of cann. 1317 and 1318 concerning particular laws have been observed.

SOURCES: c. 2220 § 1

CROSS REFERENCES: cc. 35, 36 § 1, 49

COMMENTARY

Josemaría Sanchis

1. In order to establish who may impose penal precepts, § 1 of this canon, similarly to the way c. 1315 referred to the power to make penal laws, refers to the general provisions regulating the powers of governance in the Church and, more specifically, to the powers related to making precepts.

During the preparation of the Code, with the statement of this general principle in penal law, a timely attempt was made to make the provisions on the juridical institute of precept found in different parts of the Code uniform. The legislators were trying to avoid introducing possible contradictions, especially on such a debated question as the nature of precepts; moreover, a different study group had the task of elucidating the question.[1]

Therefore, the following are required in order to impose penal precepts: *a*) to have the power of governance or jurisdiction, and *b*) that power must allow precepts to be imposed in the external forum. This

1. Cf. *Comm.* 2 (1970), p. 101; 7 (1975), pp. 95–96; 8 (1976), p. 174.

means that it is necessary to have executive power in the external forum (cf. c. 35). In addition to those who also have legislative power, ordinaries (cf. c. 134 § 1) and their delegates (cf. c. 137), the latter within the limits of their mandate, enjoy that power and may therefore make penal precepts. The dicasteries of the Roman Curia, who have vicarious executive power (cf. c. 1356 § 1 in relation to c. 361), may also make penal precepts within their respective material competences, as may bishops' conferences.

However, those who may only impose non-jurisdictional precepts are excluded, as are those who may exercise their power only in the internal forum (cf. c. 596). On the other hand, it does not appear that judicial vicars and judges enjoy such power, except in regard to internal discipline of the tribunals (cf. c. 1470 § 2).

2. Both medicinal and expiatory penalties may be mandated using penal precepts. However, a requirementconsistent with the proper nature and operability of penal precepts, since reference is made to specific situations and persons, is that penalties threatened by means of penal precept must always be determined penalties. Furthermore, because of their gravity, from among expiatory penalties, those that are perpetual by nature (for example, dismissal from the clerical state or deprivation of office) or by the will of the superior are excluded from the scope of penal precepts. In any case, § 2 explicitly refers to c. 1318, so as to take into account the restrictive juridical-pastoral criteria stated in it on threatening censures and *latae sententiae* penalties.

Similar to the way c. 1317 provides for penal law, this canon, also in § 2, did not wish to omit recalling that "a precept to which a penalty is attached is not to be issued unless the matter has been very carefully considered."

The legitimacy of a precept is determined by its essential elements, which are competence, written form and notification or summons. Functional competence is executive power in the external forum, territorially, personally or materially determined. The external form of a precept must obligatorily be written, with at least a summary indication of the reasons (cf. c. 51). Notification or summons of the precept may be made ordinarily (document with the written text of the precept), extraordinarily (cf. c. 55) or by the equivalent (c. 56).

A precept takes effect only after the notification of the addressee (c. 54 § 1) and ceases to be effective by legal revocation and upon cessation of the law under which it was executed (c. 58). The norms on the temporary effect of penal laws in c. 1313 are not applicable to precepts because, precepts always refer to specific persons and situations.[2]

2. Cf. *Comm.* 8 (1976), p. 174.

As is true for penal laws, in case of doubt, penal precepts must be strictly interpreted (c. 36 § 1), and they cannot be extended to other cases that are not explicit in the precept (c. 36 § 2).

Like any administrative act, a penal precept may be impugned. For the reasons established by law, annulment, revocation or modification may be requested from the administrative authority superior to the one that made the precept (hierarchical recourse in cc. 1732–1739) or in an contentious-administrative process (c. 1445 § 2; *PB* 123).

1320 In omnibus in quibus religiosi subsunt Ordinario loci, possunt ab eodem poenis coerceri.

In all matters in which they come under the authority of the local Ordinary, religious can be constrained by him with penalties.

SOURCES: cc. 619, 631; PIUS PP. XII, Alloc., 8 dec. 1950, I (*AAS* 43 [1951] 28); *CD* 35; *ES* I, 25; *MR* 44

CROSS REFERENCES: cc. 134 § 1, 591, 593, 594, 596 § 3, 631, 678 § 1

COMMENTARY

Josemaría Sanchis

1. In clerical religious institutes of pontifical right, the chapters (cf. c. 631 § 1) and the major superiors (cf. c. 620) have "ecclesiastical power of governance, for both the external and the internal forum" (c. 596 § 2) over their members. Major superiors of clerical religious institutes and societies of apostolic life of pontifical right are also ordinaries and, with respect to their members, have ordinary executive power (cf. c. 134 § 1). Consequently, insofar as the chapters and the superiors can issue norms, they may also establish penalties to encourage fulfillment of the norms. Therefore, there is no doubt that superiors of those institutes may, within the limits of their competence, impose penal precepts upon their members.

Institutes of consecrated life (religious or secular) of diocesan right are "under the special care of the diocesan bishop" (c. 594). But, those of pontifical right, with regard to exemption from the regimen of local ordinaries (cf. c. 591), "in their internal governance and discipline, (...) are subject directly and exclusively to the authority of the Apostolic See" (c. 593). These norms are also applicable to societies of apostolic life (cf. c. 732).

However, "in matters concerning the care of souls, the public exercise of divine worship, and other works of the apostolate, religious are subject to the authority of the bishops" (c. 678 § 1).

2. With these assumptions we may ask some questions regarding the meaning and scope of this canon.

Although by its systematic placement under the title devoted to the constituent sources of penalties (penal law and penal precept), one would assume that the reference is to the constitutive moment of penal norms, in reality, the content may equally well be applied to the moment of imposition. The verb used (*coercere*) is the same one used by c. 1311 in the

general statement on the original right of the Church to punish members of the faithful who commit offenses.

In both cases, the canon would merely be making a general principle explicit with respect to the members of a religious institute; the principle is the subjection of the faithful to canonical norms (cf. cc. 12 and 13), including penal norms, that affect them because of territory, personal conditions or subject matter.

Therefore, with regard to the constitutive aspect of penalties and the internal regimen and discipline of the institute, religious are subject to the norms, including the penal norms, of their superiors. With regard to the discipline common to the entire Church, the care of souls, the exercise of divine worship and works of the external apostolate, they are also subject to the laws, including penal laws, of the bishop.

Nevertheless, instead of referring to the diocesan bishop or his equivalent, the text of the canon refers to the local ordinary (cf. c. 134 § 2), which also includes the offices of vicar general and episcopal vicar, offices that possess neither legislative nor judicial power, but executive power alone.

Thus, it appears that when the canon states that the local ordinary may punish religious with penalties, it is trying to emphasize that the local ordinary, when necessary, may make particular penal norms and precepts that also affect religious, including the exempted, in all matters in which the religious are subject to them. Something similar may be said with respect to imposing penalties; that is, the local ordinary, in accordance with the norms that establish competence, may initiate a penal procedure and, if applicable, by extrajudicial decree, may impose the appropriate penalties, when the author of the offense is a member of a religious institute.

TITULUS III
De subjecto poenalibus sanctionibus obnoxio

TITLE III
Those Who Are Liable to Penal Sanctions

INTRODUCTION

Ángel Marzoa

1. *Introduction to the title*

Book VI opens with an affirmation of the Church's "own inherent" right to punish the faithful who commit offenses (c. 1311). Then it determines the types of penal sanctions the Church uses to exercise this *ius puniendi* (c. 1312). The constituent sources of canonical penalties are established in title II (cc. 1313–1320). Title III focuses on a member of the Christian faithful as "liable to penal sanctions," or in what amounts to the same thing, as a possible offender liable to penal sanctions.

Therefore, it is focused on one of the points to which singular care was given during codification. It is, in fact, one of the references that inspired the reform of penal law:[1] respect for human dignity and the resulting guardianship of individual rights. Undoubtedly, the punishment of offenses is an area with enormous sensitivity to everything concerning human dignity and individual rights, and the 1973 *Schema*[2] shows that many of those who were consulted adequately recognized that concern.

2. *Anti-juridicality, imputability, culpability, responsibility, and punishability*

The central concept underlying the whole title is imputability. Imputability is the essential constituent of the subjective element that, together with the objective and the legal elements, forms the identity of the offense

1. Cf. Code Commission, *Schema documenti quo disciplina sanctionum seu poenarum in Ecclesia latina denuo ordinatur. Praenotanda*, Typis polyglottis Vaticanis 1973, p. 5.
2. Cf. *Comm.* 7 (1975), p. 93 (no. 1).

(see commentary on c. 1321). Consequently, this concept is the axis of the whole title.

Therefore in the first canon of the title (c. 1321), the sources of imputability (malice or culpability) will be indicated, since those factors must be considered and verified for each case, following the criteria of that canon, before proceeding to the penalty.

In the following canons, the legislator lists all the circumstances that might affect imputability (annulling it, increasing or decreasing it) in a decisive way with a view to punishing the action that is an offense in and of itself. The legislator will determine the treatment that each should receive with a view to the penal sanction.

Therefore, to understand the canons in this title properly, it will be useful to distinguish certain concepts. Although the concept of imputability is the central concept of the entire title, behind all the canons therein—that in one way or another treat the circumstances that might modify imputability—the legislator omitted the term "imputability" in most cases, Instead, he opted for other terms when applying penal norms, all of which are along the lines of "favor rei," the indisputable principle in penal matters.

a) The first thing that needs to be taken into account is that it is not necessarily the same thing to speak of *moral imputability* as it is to speak of *juridical-penal imputability*. The distinction is not an easy one, but it is essential in order to distinguish sufficiently between a *sin* and an *offense*.

Imputability is that property by virtue of which an act is attributable to the author of the act, with regard not only to the mechanical or physical cause, but also to the human cause, meaning the act is freely perpetrated. Only insofar as an act is properly speaking human—it is not enough that a human did it—can the author be held responsible for it. Therefore, responsibility can be predicated only for imputable acts. Imputability is a property *of an act*, something that can be advocated for a determinate act in relation to the subject who authored it. If the act is truly imputable to someone, that someone is said to be culpable; this means that in addition to having "caused" the act, he is culpable for the act. Depending on whether we are speaking of the agent or of the act, we shall speak respectively of *culpability* (the agent is culpable for the act) or of *imputability* (the act is imputable to the agent). The consequence of imputability/culpability is *responsibility*: the author must answer for what he has done.

As Michiels observes, although strictly speaking imputability should be considered to be a *proprietas objectiva actionis* so as to indicate the *ex parte actus* relationship between a certain act and the author thereof, nevertheless, in practice the term imputability is not infrequently also used to designate the subjective quality of the agent proper (juridical culpability). Therefore, the agent should be held to be the author of the act he

has committed.[3] Expressions such as "imputable subject" are frequently read; such use is habitual in the secular juridical world. However, we prefer the expressions "imputable act" and "culpable/responsible subject," so as to avoid confusion and imprecise language.

But, so far, we have not introduced any criterion for distinguishing the two. The concept of accountability will best enable us to perceive the delineation between moral and juridical imputability: "A *sinner* has only to answer to God for a *moral* order violation. For a violation of the *juridical-social* order, an *offender* must answer to God and the Church."[4] In our opinion, Miguélez's words precisely define the criteria for making the distinction. One can speak of juridical imputability only insofar as the author—in this case a *christifidelis*—must answer not only to God but also to the Church. Insofar as an answer is required by penal law and is evaluated in terms of a penalty, one may speak of juridical-penal imputability: "A person who deliberately violated a law or precept is bound by the penalty prescribed in that law or precept" [meaning: by a *penal* norm] …" (c. 1321 § 2). The explicit expression of what the "response" must be lies in "is bound by," meaning, "will bear the consequent sanction."

Thus, we begin to understand the fourth concept, *punishability*, which in the end defines the content of penal responsibility. It is necessary to have a penal norm that explicitly states the consequences of certain antijuridical acts by designating penalties; then, based on that norm, one may speak of *juridical-penal imputability.*

Imputability is a property of the act itself, by virtue of which the act is *attributable* to someone. It is precisely in this attribution that one finds the substance of imputability. In what way is it attributable? If we said that it is attributable insofar as the author is just the material author, we would be adding nothing new. When we speak of imputability, we mean a new attribution, qualitatively different from mere physical causation; a new quality has been attributed or imputed to the act that has been committed. This quality is that of *sin* in the moral field and *offense* in the juridical-penal field.

The imputability spoken of in penal law cannot generically be moral imputability, for moral imputability is a necessary assumption. Juridical imputability assumes a previous concept, *anti-juridicality,* that is in turn a quality of the action by means of which, because of previously being typified as an offense, the action is deemed to be contrary to the just social order. Thus, juridical-penal imputability assumes that the committed and imputable act breaks down the juridical-social order and is harmful, and

3. Cf. G. MICHIELS, *De delictis et poenis*, I, *De delictis* (Paris-Tornai-Rome-New York 1961), p. 89.

4. L. MIGUÉLEZ, commentary on c. 2195, in *Código de Derecho Canónico*, 8th ed. (Madrid 1969), p. 804.

therefore is imputed to its author *as an offense* deserving of a penalty.[5] This penalty is precisely what gives the measure of the response—responsibility in penal terms.

If we stay strictly within the juridical-penal area, the question could be summarized as follows: *typification* is an act by the legislator by virtue of which (on this point see introduction to book VI) certain behavior harmful to the social order (the offense) is established as *antijuridical*. When this type of behavior occurs—if it meets the requisites that we shall next indicate—then it is *imputable* to its author as an *offense*, or in other words, that the author is *culpable* of this offensive behavior. As a consequence, he is *responsible* for this behavior. His responsibility—the response he should make to society—is the penalty: the behavior is thus *punishable*.

What we have been saying so far could lead us to the following conclusion: If after this type of act we have an imputable offense, then the subject's responsibility is what doctrine has called objective responsibility—responsibility born *directly* of the antijuridical result (if the antijuridical result is materially produced, there is an offense, and as such it is imputable, hence punishable). But, that is not the way it is. Rather, "the transition from objective penal law (responsibility based on the result) to subjective penal law (responsibility based on psychic causation) is the moment of most intense progress in penal law."[6] It is antijuridicality that assumes there is an objective action-norm relationship; imputability/culpability, on the other hand, refer to the relationship between the act and the agent. Here is where we should retrieve a concept to which we alluded at the beginning—the idea of *moral imputability*. "Social order [within which juridical-penal order is situated] is not separate from moral order but a part of it. Hence there can be no imputable violation of the social order, that is to say, an *offense*, if there is not also violation of the moral order, that is to say, a *sin*."[7] Insofar as juridical matters concern human acts, and human acts belong to the qualifying moral area, only where there is proper moral imputability can there be juridical imputability; the act must necessarily have been voluntary, conscious, and free before the author can be considered juridically responsible (maliciously and culpably).

This does not mean that whenever there is moral imputability there is also juridical imputability; or in more definitive terms, all offenses assume there is sin, but all sin does not necessarily assume there is an offense. This statement must be properly understood. It does not mean that *sin* is the basis of *offense*, so that after absolution of sin, responsibility for

5. Cf. F. NIGRO, commentary on c. 1321, in *Commento al Codice di Diritto Canonico* (Rome 1985), p. 759.

6. E. CUELLO CALÓN, *Derecho Penal: Parte general*, vol. I, 17th ed. (Barcelona 1975), p. 415.

7. Ibid.

the offense disappears. Saying that "every offense assumes a sin" is a *statement of fact*; where there is offense there is necessarily a grave, conscious, and free violation of a divine or ecclesiastical norm that protects the Church's fundamental interests, meaning a violation of the moral order, a sin. But, an offense arises from and displays all its effect in the juridical order. Once the offense has been committed, in some way then it becomes separated in its *iter* from the area of sin and "takes on a life of its own." This means that we find ourselves facing three possibilities: *a*) there is sin, but no offense, because a violation of the moral order is not typified as an offense in a penal norm, for example, failing to fulfill the dominical precept. *b*) There is sin, and this violation of the moral order is typified as an offense, but in the specific case there is no offense due to the lack of one of the constitutive elements of an offense, for example, an abortion committed by a minor. *c*) There is both sin and offense. In this last case, it might be that the sin was duly absolved, but the offender remained under the bond of the penalty because it had not yet been remitted, for example, someone who is punished under c. 1391 for having made a false statement in an ecclesiastical public document and who has duly confessed the sin but is still under the penalty that in his case was imposed upon him.

b) In c. 1322, we find another concept, that of *incapacity*. Here, there is no place for the issue of greater or lesser imputable gravity. For the purposes of penal law, and without delving into the issue, the canon established the incapacity to commit an offense for people who habitually lack the use of reason. This *iuris et de iure* assumption avoids the debated and complex the issue in c. 2201 § 2 of *CIC*/1917 that established a *iuris tantum* presumption (see commentary on c. 1322). The point of departure is that anyone habitually lacking the use of reason is always "deemed incapable" of committing an offense, even though in a given case appearances might suggest the opposite. Without prejudging the question of moral imputability, the legislator wishes positively to close the door on any possible consideration of penal imputability; incapacity is determined *ex lege*.

c) In c. 1323, the legislator introduces a new term: *punishability*. The canon enumerates a series of circumstances that, after being verified, determine without further consideration that there will be no penal sanction. Analysis leads us to conclude that the circumstances included in the canon (see commentary on c. 1323) are of various types. For example, positive determination of penal age (no. 1°), implying that the legislator chose one option among several, is not the same as the actual lack of the use of reason (no. 6°), which is an obvious and necessary transcription from natural law. However, in one way or another, all of them are circumstances that affect the integrity of imputability. Yet, the legislator does not limit himself to enumerating a list of circumstances that might affect imputability. That would imply the need for an judgment by a judge or superior in order not to impose a penalty. This occurred in cc. 2201 ff of *CIC*/1917. Instead, the

canon directly establishes the effects: "No one is liable to a penalty who ..."

To summarize, the legislator is not literally establishing the causes that exempt from *imputability*, but that exempt from *punishment*. If the first were literally the case, some of the causes included in the canon could give rise to arduous debates. For example, how could it be said that anyone who is not yet sixteen years of age does not act freely and voluntarily, and is therefore not subject to imputability? (cf., e.g., the wording of cc. 2204 and 2230 *CIC*/1917). But, when the norm specifically establishes *non-punishability*, all finally goes back to the positive will of the legislator, which in the application of penalties is not open to discussion. The basis for this decision on non-punishability doubtless lies in the fact that the circumstances listed suggest a defect in full imputability, but the legislator does not wish to leave this task of assessment to the person who applies the penal norms. Instead, the legislator directly and automatically determines the assessment by establishing certain causes exempt from punishment.

The case is similar to c. 1324 (see commentary), which enumerates a series of attenuating circumstances. But, as before, the circumstances do not literally attenuate *imputability*—again we would face endless possibilities for discussion—but they attenuate *the established penalty*. The judge or superior must limit himself to verifying that one of the circumstances exists, although in some cases this will not be an easy task because it is indeterminate. Then, he can attenuate the penalty or substitute a penance for it. Undoubtedly that most of the causes listed in the canon affect imputability; that is why they are included. But, the legislator expressly opted to establish the play between greater or lesser imputability; he did not leave the matter to the judgment of the judge or superior, but determined the reduction or substitution of the penalty *a iure*. Evidence of this can be found in no. 10° of § 1, covering the possibility of some other circumstance not expressly included and that might, as the others, affect full imputability, but that circumstance has not been foreseen. The decision is left in the hands of the judge or superior—here he may exercise judgment—and the effects are identical.

Finally, c. 1326 gives some circumstances that might aggravate the penalty: "A judge may inflict a more serious punishment that that prescribed ..." Again, here on the basis of a possible greater fullness of imputability, the legislator establishes the effect of aggravation in terms of *punishability*.

After considering exempting, attenuating, or aggravating circumstances and thus broadening the possibilities to include those that might also be established by particular law or precept (cf. c. 1327), this title is concerned with two particular instances of delinquent imputability. They are attempted or incomplete offenses (c. 1328) and jointly committed offenses (c. 1329). In both cases, they are being treated in terms of

punishability, doubtless in the belief that imputability underlies both types of offense.

Lastly, c. 1330 occupies a place in the overall organization that is justified perhaps because instances of incompleteness—attempts—were previously treated. The canon resolves an old thorny question on the completion of offenses where it is not always easy to determine the external character. In reality, insofar as it tries to establish a definitive criterion to verify the existence of an offense, it should be placed with § 1 of c. 1321.

3. *Conclusion*

This title goes back to the unity of cc. 2199–2213 and 2226–2235 of the Pio-Benedictine code. In the *CIC*/1917, codification took up three titles, while here it is combined into a single one, with certain questions correctly placed elsewhere in book VI. In the older Code, in a certain way the question of imputability was treated separately (cc. 2199 ff) from punishability (cc. 2226ff). As we have seen, *CIC* gathers it all together and directly treats the questions that affect imputability in terms of punishability or non-punishability.

At first (*Schema* of 1973[8]), everything referring directly to imputability was reduced to a general statement of the circumstances that exclude imputability and punishability in general (cc. 11–13 of the 1973 *Schema*). In the end, it was decided to be specific, a solution more in agreement with what ought more properly be part of penal law: greater detail in the circumstances and their effects.[9] Because this looks more directly at reality, it moves away from discretion that would make the task of applying the law enormously difficult and would also imply greater risk of arbitrariness or relinquishing the *officiium puniendi*.

This fact should have been sufficiently emphasized by now: the tenor of the entire title reflects *punishability*, not the requirements that determine the essential elements of an offense. That is why certain canons (1330, 1328, etc.) make decisions on legal designation that do not involve basic considerations about the nature of an offense; they are prudent decisions by the legislator that resolve possible *de facto* problems in applying the norms.

All of this theoretically means a greater simplification of the task of applying the laws, even though in specific cases it has meant a certain amount of technical impoverishment in considering typical penal questions such as accomplices and attempted offense.

8. Cf. ibid.: *Praenotanda*, p. 7; and *Schema*, cc. 11–13.
9. Cf. *Comm.* 8 (1976), pp. 177ff.

1321 **§ 1. Nemo punitur, nisi externa legis vel praecepti violatio, ab eo commissa, sit graviter imputabilis ex dolo vel ex culpa.**

§ 2. Poena lege vel praecepto statuta is tenetur, qui legem vel praeceptum deliberate violavit; qui vero id egit ex omissione debitae diligentiae, non punitur, nisi lex vel praeceptum aliter caveat.

§ 3. Posita externa violatione, imputabilitas praesumitur, nisi aliud appareat.

§ 1. No one can be punished for the commission of an external violation of a law or precept unless it is gravely imputable by reason of malice or of culpability.

§ 2. A person who deliberately violated a law or precept is bound by the penalty prescribed in the law or precept. If, however, the violation was due to the omission of due diligence, the person is not punished unless the law or precept provides otherwise.

§ 3. When there has been an external violation, imputability is presumed, unless it appears otherwise.

SOURCES: § 1: cc. 2195 § 1, 2199, 2200 § 1, 2218 § 2, 2228; PIUS PP. XII, Alloc., 3 oct. 1953 (*AAS* 45 [1953] 737, 741); PIUS PP. XII, Alloc., 5 dec. 1954 (*AAS* 47 [1955] 62); PIUS PP. XII, Alloc., 26 maii 1957 (*AAS* 49 [1957] 406)
§ 2: cc. 2199, 2200 § 1, 2203 § 1, 2226 § 1, 2228; PIUS PP. XII, Alloc., 3 oct. 1953 (*AAS* 45 [1953] 741–743); PIUS PP. XII, Alloc., 5 dec. 1954 (*AAS* 47 [1955] 62); PIUS PP. XII, Alloc., 26 maii 1957 (*AAS* 49 [1957] 406)
§ 3: c. 2200 § 2; PIUS PP. XII, Alloc., 3 oct. 1953 (*AAS* 45 [1953] 741)

CROSS REFERENCES: cc. 11, 221 § 3, 1315, 1319, 1322–1330

COMMENTARY

Ángel Marzoa

I. NOTION OF OFFENSE

CIC/1917 introduced book V with an express definition of offense (c. 2195). *CIC*, more technically correct, prefers to avoid definitions in legal texts "quae ad doctorum magis quam ad legislatoris pertinent

officium."[1] However, we shall try to create one for the new legislation by following in the tracks of the terms used in c. 2195 *CIC*/1917.

A. *Terminological issues*

In Church law, terminology referring to offenses is as varied as it was, for example, in Roman law. Terms such as "crimen," "delictum," "scelus," "excesus," "maleficium," and "facinus" are frequent in classical law, although there is a certain preference for the first two expressions, particularly "crimen." "Delictum" is regularly used in *CIC*/1917 and *CIC*, but to refer to "the crime of falsehood," the word "crimen" is used in title IV of part II (cc. 1390–1391; cf. cc. 2360–2363 *CIC*/1917).

B. *Definition*

Inspired by c. 2195 *CIC*/1917 and the terms used in the current c. 1321, an offense may be defined as *an external and gravely imputable violation of a norm that carries a canonical penalty.*

The definition includes the three elements considered by doctrine to constitute an offense[2]:

— the objective element: "external violation ... of a [law]"

— the legal element: "violation of a [law] that carries a ... penalty"

— the subjective element: "gravely imputable"

The issue of a more precise definition of the constituent elements of an offense was raised in an *animadversio generalis* at the *Schema novissimum* in order to avoid confusion and preclude any possibility of arbitrariness in penal matters. But, the *Coetus consultorum* appealed to their firm proposal of avoiding any definition and added "principia tamen clare erui possunt ex canonibus (cf. v. gr. can. 1272)."[3] The remission made by the *Coetus* corresponds exactly with this canon, and it appears to legitimize even further (if that is possible) the fact that we shall discuss this matter a propos of this canon. Let us, then, look at each of these elements

1. Code Commission, *Schema documenti quo disciplina sanctionum seu poenarum in Ecclesia latina denuo ordinatur. Praenotanda* (Typis Polyglottis Vaticanis 1973), p. 6.

2. Among those who expressly discuss these three elements: V. DE PAOLIS, *De sanctionibus in Ecclesia (Adnotationes in Codicem: Liber V)* (Rome 1986), pp. 40ff; F. AZNAR, commentary on c. 1321, in *Salamanca Com*; J. ARIAS GÓMEZ, commentary on c. 1321, in *Pamplona Com*; F. NIGRO, commentary on c. 1321 in *Commento al Codice di Diritto Canonico* (Rome 1985), p. 758; L. CHIAPPETTA, *Il Codice di Diritto Canonico* (Naples 1988), pp. 424–425; T.J. GREEN, commentary on c. 1321, in J.A.CORIDEN-T.J. GREEN-D.E. HEINTSCHEL (Eds.), *The Code of Canon Law: a text and commentary* (New York 1985), p. 901. With respect to the *CIC*/1917, cf. G. MICHIELS, *De delictis et poenis*, I, *De delictis* (Paris-Tornai-Rome-New York 1961), pp. 63ff.

3. *Comm.* 16 (1984), p. 38.

separately. That will enable us to get to the heart of the concept of offense and also to sketch the criteria for interpreting penal laws.

C. *Objective element of the offense*

1. *Historical considerations*

Since the beginning, in Church life only the gravest and most flagrant sins have been considered as meriting a penalty. These are the ones that in some way affect the common good (scandal, danger of perversion, etc.). Such is the case with homicide, fraud, blasphemy, adultery, fornication, etc., that, because they were in contrast to *simple* sins, were known as *crimina* or *delicta*. Thus, they possessed de facto affirmation. But, by the fourth century, it was explicitly stated that the proper object of canonical penalties is not sin that is merely internal, but only sin with external dimensions—a sin the commission of which breaks up the order of ecclesiastical society.

The following centuries witnessed not only the distinction between sin (*coram Deo*) and offense (*coram societate*), but also a gradual clarification of the juridical-public or antisocial nature of an offense. That is a question upon which the Church has always left its mark of originality. For Roman law, repression of "offenses" was always more or less privately juridical in nature (the authorities paid more attention to private harm caused by the violation of a law than to any harm that might befall society as a result of the violation). Germanic law treated it almost exclusively from the private point of view (it was more frequent for the affected individuals, using the personal *vindicta*, to proceed against an offense than for the authorities themselves to do so). However, leaving aside issues of terminology, the Church has since the beginning defended the public juridical nature of an offense. The Church does not punish it as a sin or act that is improper in itself, opposed to God and to the personal sanctification of the offender (internal forum); nor does the Church, at least directly, punish it as an act that violated some singular right of other faithful (contentious forum). It punishes an offense as an act that endangers public safety and disturbs the just social order of society (*tranquillitas*).[4]

This public juridical nature of offenses gradually matured in many of the Church's law texts, in the doctrine of theologians and canonists, and in the practice used for treating the subject of offenses through the centuries.

4. Cf. G. MICHIELS, *De delictis*..., cit., pp. 63–65.

2. *External violation of a penal norm*

In the term *external violation of a penal norm*, we have identified the objective element of the offense. Let us look at it in detail.

a) *Violation*: There must be an effective violation (by commission or omission) of a penal norm that is in effect; assumptions of erroneous conscience have no juridical-penal relevance. Although from the strictly moral point of view an act with erroneous conscience to violate a norm may constitute a sin, in the juridical-penal area only an *effective* violation of a penal norm can result in an offense.

b) *Of a penal norm*: The Code expressly establishes that the violation must violate a law or precept. This positively excludes custom (cc. 23–28) as a source of penal norms.

c) *External violation*: The Church *his in terris* is a juridically structured society with its own objectives; by virtue of its power of governance, it directly and immediately safeguards the public and spiritual good of its faithful.[5] In this context, coercive power must be understood as "potestas publica ad finem socialem attingendum concessa"; therefore, the actions that it oversees must also be "sociales," external. Violations must therefore be *external*. Consequently, an action that does not take place in the "mundum externum physicum" will not be an offense.[6] *External* is not the opposite of *private* or *occult*, but of *internal*. A merely *internal* act is, as such, irrelevant for penal law ("cogitationis poenam nemo patitur"). However, within external acts we can find the following variants:[7] *a*) external, but in fact not known by anyone (*occult*); *b*) external, and known by the community (*public*); *c*) external, and known only by a few (*potentially public*). Which of these is to be considered "externa" for the effects of c. 1321?

The answer cannot be exclusive. Naturally, case *a*) seems sufficient: the violation remains in fact occult but may be relevant in current legislation. Cases such as those indicated in cc. 1367 or 1398 are clear examples of the possibility of this situation (in fact, in a session of the Commission, retention of *latae sententiae* penalties was justified precisely because it was considered to be "unicum... medium aptum ad tutandum bonum animarum quod in discrimen venire potest per quedam delicta oculta"[8]). Case *b*) does not appear to be a requisite, unless possibly in cases where an action *ex* c. 1399 is being punished because of the grave scandal that must

5. Cf. G. MICHIELS, *De delictis...*, cit., p. 70.
6. V. DE PAOLIS, *De sanctionibus in Ecclesia (Adnotationes in Codicem: Liber V)* (Rome 1986), p. 41.
7. Cf. F. COCCOPALMERIO in *La normativa del nuovo Codice*, 2nd ed. (Brescia 1985), pp. 303–304.
8. *Comm.* 8 (1976), p. 171. And with direct reference to the crime of abortion from c. 1398, cf. *Comm.* 9 (1977), p. 317.

necessarily follow before recourse to punishment can be legitimate. Case *c*) is essential in some offenses; the situation of an occult offense is insufficient in cases covered by c. 1330.

In summary, saying that the violation must be *external* means that it is sufficient for the action to be *external-occult*, but exceptionally it may be required that it at least be *semi-public*, which means, that the "external character" is the opposite of "internal," not of "private" or "occult," and is not necessarily identified with "public character."

3. *Harm to society*

Social harm is the third component of the objective element.[9] Every violation of a penal norm causes multiple damage. First, there is harm to the author of the violation. In committing the offense, he is threatening his own good in the bosom of the Church, his own "integral development [in as much as he is a] human and Christian person,"[10] meaning that he is threatening his own sanctification. Then, there is possible harm to the subjective rights of third parties. Finally, there is the harm that always derives from the very fact of breaking a penal law that is established precisely to defend all members of society, or, in the words of John Paul II, "a deficiency ... in the common good."[11]

Which of these types of "harm" constitutes the formal reason for the offense? Certainly not the first, for sanctification of the faithful is not a direct object of penal jurisdiction. That would mean reducing sanctity merely to justice in its strictest sense. Nor is it the harm caused to third parties, since the protection of individual rights falls under civil action (cc. 1729 ff). It is the third type, the harm every offense causes society. External violation of a penal norm is an offense because it is "anti-ecclesial behavior";[12] it disturbs the social order, the *tranquillitas publica*, in that a violation results in scandal for members of the ecclesial community. It endangers their safety and security and breaks down the confidence acquired by the social authority for protecting the common good—"an indispensable condition for the integral development of the human and Christian person."[13]

9. Cf. a classic and unsurpassed study on "harm to society" as the formal reason for delict in G. MICHIELS, *De delictis*..., cit., pp. 73–77.
10. JOHN PAUL II, "Discurso al Tribunal de la S. R. Romana, 1979," in *Insegnamenti di Giovanni Paolo II*, II/1 (1979), pp. 411–412.
11. Ibid.
12. Ibid.
13. Ibid.

D. *Legal element of the offense*

1. *Historical considerations*

Although some texts from classic Roman law could be adduced that are literally favorable to what is currently known in the doctrine as the principle of legality (for example, Ulpian's text: "poena non irrogatur nisi quae quaque lege vel quo alio jure huic delicto imposita est"[14]), it does not appear that this principle was an absolute and strongly rooted norm in the classical juridical world, in the debatable case that it existed at all. Other norms apparently contradict it (for example, Modestino would seem to advocate a sort of analogical application of penal norms: "quamquam enim temerarii digni poena sint, tamen ut insanis illis parcendum est, si non tale sit delictum, quod vel ex scriptura legis descendit vel ad exemplum legis vindicandum est"[15]).

What is beyond doubt is that modern juridical systems have evolved in the direction of considering *nullum crimen sine lege* as an incontrovertible principle. In canon law prior to *CIC*/1917, there was discussion of whether this legal element was part of the essence of an offense and how intimately it was bound up therein.[16] In any case, with the passing of time it seems clear that the power to punish has been gradually restricted to the point of being limited to the anti-juridical acts that are designated in the law as offenses and for which a penal sanction is mandated.[17]

Michiels deduces that c. 2195 of *CIC*/1917 arose from this custom that has gradually been introduced.[18] In any case, as Roberti observes, we find no precept that clearly establishes the need for the legal element when, he says, in addition, "ex iure naturali dolus et damnum sufficiunt ad constituendum crimen."[19]

It seems clear that the principle of legality, according to which *nullum crimen, nulla poena* can exist *sine lege poenali praevia*, was included in c. 2195 of *CIC*/1917. The legal text clearly suggests that an offense is a violation of a *law* that *carries a penal sanction*. However, it is good to bear in mind that c. 2222 § 1 cast a doubt on the strength of c. 2195's definition of the principle of legality.

(See introduction to book VI with respect to the foundation of the principle of penal legality in canon law).

14. L. 131, D. 4, 16.
15. L. 7, D. 48,4.
16. For this question one should see G. MICHIELS, *De delictis...*, cit., pp. 78–80.
17. Cf. O. GIACCHI, "Precedenti canonistici del principio 'nullum crimen sine praevia lege poenali'," in *Studi in onore di F. Scaduto* I (Florence 1936), pp. 435–449.
18. Cf. G. MICHIELS, *De delictis...*, cit., p. 82.
19. F. ROBERTI, *De delictis et poenis*, I/1 (Rome 1930), p. 70.

2. *Principle of penal legality*

The essence of an offense lies not just in the "externa violatio legis," but in the violation of a law that implies social harm. Deciding which violations cause social harm and to what degree the laws provide penal protection (penal laws) is the legislator's task. The decision to protect with penalties certain aspects of the ecclesial common good is a matter of "legislative policy." Trying to protect against all violations would condemn the penal system to ineffectiveness and would also make it odious. We have only to compare book V of *CIC*/1917—to avoid delving farther back in history—with the new book VI to see that this is the reality of the matter. At a given moment in time, the legislator considered it right to designate certain types of behavior as offenses, to the exclusion of other types. Designation is achieved through penal norms. This means that there are offenses only where the legislator has expressly designated a given type of behavior as meriting a penalty.[20] Thus, the fact that there is a penal norm (law or precept) that so designates certain behavior is another of the constituent elements of an offense. In doctrine, this has been considered to be the *principle of penal legality*: "nullum crimen sine lege poenali previa." The principle of penal legality, in itself, is not merely a question of policy or good governance (but the quantitative determination of offenses at each moment in time is a question of policy). The principle of penal legality responds to a deeper need, situated by doctrine in human dignity. This acquires a special meaning in canon law, for which human dignity is elevated by the condition of being baptized[21] (see introduction to book VI).

In *CIC*/1917, this element is expressly considered in c. 2195 (§ 1: "legis violatio cui addita sit sanctio canonica"; and § 2: "quae... de delictis applicantur etiam violationibus praecepti cui poenalis sanctio adnexa sit"). On the other hand, § 1 of c. 1321 *CIC* does not offer an express reference to this legal element, but it is clearly deducible from the terms of § 2: "lege vel praecepto statuta..." in connection with c. 221 § 3 (the problem raised with respect to the principle of penal legality in c. 1399 is another issue; the same is true of c. 2195 *CIC*/1917 in relation to 2222 *CIC*/1917. See commentary on c. 1399).

Although a strict and clear restatement of the principle of penal legality was called for during the codification process, the current c. 1399 was retained. The question of the effectiveness of this principle in the Code notwithstanding, it continues to be debated in the doctrine. For example, De Paolis's conclusion on the legal element is understandable:

20. See Introduction to *Liber* VI with respect to the "positive" character of the crime, and in general with respect to the question of the principle of penal legality under canon law.
21. Cf. J. HERRANZ, "De principio legalitatis in exercitio potestatis Ecclesiasticae," in *Acta Conventus Internationalis Canonistarum* (Rome 1968), pp. 221–238; J. ARIAS GÓMEZ, "El sistema penal canónico ante la reforma del *CIC*," in *Ius Canonicum* 15 (1975), pp. 185–208.

"Ulterius manet investigandum num Codex applicet principium legalitatis et quinam sit sensus et quodnam momentum in iure canonico huius principii."[22] Actually, both c. 1399 and the proliferation of indeterminate penalties in pt. II (areas of clear discretion) somewhat dilute the strictness of the principle. In any case, it can be said that, except for c. 1399, which doubtless introduces the discretionary principle, no behavior that has not been expressly designated as an offense in a penal norm can be punished in the Church.

E. *Subjective element of the offense*

On the basis of the terminology of this canon, we have situated the subjective element in the terms "gravely imputable." No one should be punished if the external violation (the objective element) of a penal norm (legal element) is not gravely imputable to him. Primarily and absolutely, this means that, in canonical penal law, the fundamental governing principle is that "objective responsibility" by itself cannot be the sole basis for punishment; there must always be imputability (for the concept of "penal imputability," see introduction to title III).

1. *Imputable violation*

The subjective element consists of the fact that the act of violating the norm must be morally and juridically imputable, and as we shall see, it must be gravely imputable. This means that it must be attributable to the author not only as the physical and material cause, but also as the formal cause; the act must be imputable to the author both morally and juridically. This means that all the elements must be verified for the commission of the offense to be considered and imputed as such; it must be a truly human act that is conscious and freely committed. In addition, all the other requisites for the offense to be juridically assessed, such as *penal* imputability and habitual use of reason must also be present.

There is a terminological change here that needs to be emphasized. *CIC*/1917 spoke of *moraliter* imputable violation, whereas *CIC* uses the term *graviter* imputable violation. One consultor claimed that the new legislation should preserve the term *moraliter*; the response was that the concept is already understood in the requirement for malice or juridical culpability as sources of imputability.[23] It seems that the expression *moraliter* imputable could be dangerously reductive, since it might make moral imputability the only type of imputability required, or in what amounts to the same thing, there would be a direct transfer from moral

22. V. DE PAOLIS, *De sanctionibus*..., cit., p. 43.
23. Cf. *Comm.* 8 (1976), p. 175.

imputability to penal sanction. The term *juridical* imputability—assuming that it is present—adds elements that are proper to the concept of *moral* imputability (see introduction to title III: no. 2,a).

2. *Gravely imputable*

CIC says *graviter* imputable (c. 1321), where *CIC*/1917 said *moraliter* imputable (c. 2195). This is not introducing a new concept, for the adverb *graviter* was present in the old legislation, although in a different place:[24] c. 2218 *CIC*/1917 established that "non solum quae ab omni imputabilitate excusant, sed etiam quae a gravi, excusant pariter a qualibet poena..." As a component of the subjective element, the gravity of imputability was then and continues now to be a substantial element of the concept of offense. Indeed, when one consultor insisted that *gravity* be mentioned in the first canon of the 1973 *Schema* (currently c. 1311), it was decided to retrieve the term "offender" from c. 2214 § 1 *CIC*/1917, where the *Schema* simply said *christifideles*[25]; this suggested that the concept of "offender" included gravity. Any faithful to whom violation of a penal law is imputable is not necessarily an offender, only one to whom the violation is *gravely* imputable.

Of what does this "gravity" consist? To answer, we first need to make some distinctions. One kind of *gravity* is where the legislator has already made the assessment at the time of designating certain behavior as an offense; at the moment in time when the penal norm becomes effective, that behavior is considered to merit penal sanction because it causes grave social harm. Every offense, consequently, presupposes that the behavior is grave, considered in the abstract, but this gravity is given and assessed by the legislator. That is not the gravity to which the canon refers, for it is already included in the law or precept that has been broken. The *gravity* we are concerned with here is the gravity referring to the subjective element, *to the person* who commits the offense. As De Paolis says, "non habetur delictum ubi non sit violatio gravis legis"[26]; "grave" modifies the term "violation," not the term "law." Gravity refers to *the act of* violation, not to the material content of the violation, which is already included in the fact of having been designated as an offense. In other words, gravity refers to imputability: *how* the offense was committed, a "how" upon which will depend whether commission is imputable with sufficient gravity to enable the actor to be considered as an *offender*, and therefore be punished.

24. Cf. ibid.
25. Cf. ibid., p. 167.
26. V. DE PAOLIS, *De sanctionibus*..., cit., p. 42.

II. SOURCES OF IMPUTABILITY

Now, we have situated imputability within the concept of offense as a constituent of the subjective element and referring to moral and juridical imputability. But the *CIC* does not mention the distinction between moral and juridical for every case; thereafter, it treats imputability in absolute terms, merely using the word "imputability." First, it treats the sources of imputability, or, in other words, what we should take into consideration to distinguish imputable from non-imputable cases, all in terms of imputability for penal purposes: "... is *bound by the penalty* prescribed" (§ 2).

The sources are named in § 2 of c. 1321: malice and culpability. They correspond to two types of violation of a law or precept: deliberately and directly, or by omitting due diligence.

A. *Malice*

"Dolus" in penal matters has its own meaning. In other parts of the *CIC* (cf. cc. 125, 643, 656, 1098, 1191 § 3), it is given the sense of "slyness, deceit, trickery, used to take advantage of others prejudicially, according to the classic Roman definition.[27] In penal law, however, "dolus" or malice is understood to mean *deliberate violation* of a law or precept.[28]

This special meaning in penal law was brought up in c. 2200 *CIC*/1917, although the definition it gave cannot be interpreted literally; c. 2200 § 1 said: "dolus heic est deliberata voluntas violandi legem." A strict and literal definition would lead to the conclusion that this type of "malice" would very rarely be determined, for it does not seem that will would normally be *directly* directed to violating the law. For that reason, doctrine interpreted the meaning of that definition in terms currently used in § 2 of c. 1321. It is not that the will is deliberately directed to violating the law, but more simply, the term suggests a will that deliberately violates the law, and that clearly is not the same.

There are two components of "malice": *a*) advertence—understanding that to so act is to violate a legal obligation; and *b*) freedom—of will. It is therefore sufficient that the faithful be conscious of the fact that his behavior is breaking a law or precept, and in spite of that, he wishes to so act. "The essence of 'malice," according to De Paolis, "is the positive will to act against the law, humanly and freely, whatever the reasons may be that lead to violating the law or precept, provided that freedom continues during the act."[29]

27. L. I § 2, D. 4,3
28. Cf. J. ARIAS, commentary on c. 1321, in *Pamplona Com*, F. AZNAR, commentary on c. 1321, in *Salamanca Com*.
29. V. DE PAOLIS, *De sanctionibus*..., cit., p. 57.

B. *Culpability*

Culpability, in the juridical sense and as stated in this canon, is "the omission of due diligence." The specifications of *CIC*/1917 for the different forms juridical culpability may take are here reduced to this simple formula. In cc. 2199 and 2202–2203, *CIC*/1917 spoke of "omission of due diligence" and "ignorance of the law violated"; for this purpose, it makes ignorance equivalent to inadvertence and error.

However, the reduced formula "omission of due diligence" also includes ignorance, and even inadvertence and error. This is clear from the debate by the Commission, where prior to establishing the definitive text for this canon, a unanimous consensus was reached that there is culpability and not "malice" in cases of omission of due diligence, of error in perceiving some exempting circumstance and of ignorance that a law or precept was being violated.[30] In addition, with respect to inadvertence and error, it seems logical that if they are made equivalent to ignorance for the purposes of exemptive causes (cf. c. 1323,2°), they should also be made equivalent in case of juridical culpability. As De Paolis astutely observed,[31] if the legislator gives a law, it is because he wishes to bind those who are subject to the law. There is, therefore, an obligation to know the law. For that purpose, the necessary diligence may be demanded. The legislator's will is that, from the time the laws are promulgated, they should not be violated by contrary behavior. If anyone violates the law—other requisites being present—he commits an offense. This applies not only to anyone who deliberately acts against a law or precept ("malice"), but also to anyone who acts against a law through ignorance due to negligence and to anyone who does not use *due* diligence to ensure that his act or omission does not effectively become a violation of a law or precept. Thus, there is a double foundation of juridical culpability: gravely culpable ignorance of the law or precept and gravely culpable omission of the due diligence required to prevent specific behavior from having an anti-juridical effect.

The double foundation can, however, be reduced to a single one: "omission of due diligence," either in knowledge of the law or to avoid acting in such a way as to break the law. So simplification of the concept of culpability as expressed in *CIC* is fully justified.

III. PUNISHABILITY FOR MALICE AND CRIME

There are two sources for imputability: malice and culpability. However, in § 2 of c. 1321, they are seen differently with regard to the punishability of the two types of conduct. Generally speaking, only an offense that

30. Cf. *Comm.* 8 (1976), p. 176.
31. V. DE PAOLIS, *De sanctionibus*..., cit., p. 57.

is imputable *ex dolo* is punishable, in other words, the deliberate violation of a penal norm. A violation consequent to the omission of due diligence (*culpa*) is theoretically not punishable unless expressly established by a law or precept (such as the case designated in c. 1389 § 2, for example).

Two important comments need to be made here:

a) The restriction in § 2 affects only punishability, not the concept of offense, which is found in § 1, where the double source of imputability is established. Thus, although except for c. 1389, as previously mentioned, the *CIC* expressly does not establish punishment for culpable offenses in pt. II, there is nothing to prevent another law or precept from determining the punishability of the offenses described in the *CIC* when they are committed with culpability.

b) The different penal treatment applied to malicious or culpable offenses in no way affects the fact that laws or precepts are obligations; it affects only punishability in case of violation.

In any case, § 2 of c. 1321 is a clear example of the "christiana misericordia" that has been adopted as a general principle in the criteria for reforming penal law.[32]

IV. Presumption of imputability

To speak of imputability implies reference to a human act that is voluntary, conscious, and freely committed. Only in such a case can the author of an offense be considered responsible with malice or culpability (see introduction to part III on the notion of imputability). This means that, insofar as juridical-penal imputability sits over moral imputability, then to speak of imputability means to look inside a person. Only there, in a person's heart, are the decisions made that, because they are freely made, are authentically human. But, this is an area that is not directly accessible to the law; thus the need for assumptions (normal, in human relationships) that are merely "conjectures" (cf. c. 1584) about what is inside a person based on external indications. Sometimes these conjectures become definitive and irrevocable judgments. Such irrevocability (*iuris et de iure* presumption) is required by the need to operate safely in juridical traffic (cf., e.g., cc. 97 § 2, 99, 1322). But, in most cases, judgments are only "provisional," based on external indications that allow giving juridical relevance to words or gestures (showing consent, for example). They may always be annulled by proof to the contrary. Such is the case for presumptions in law (*iuris tantum*).

32. Cf. Code Commission, *Schema documenti*..., cit., p. 5.

Since among its essential elements the notion of offense contains subjective elements—the agent's freedom to act—here too the play of presumption is necessary; it starts from the principle that all behavior is *human* behavior. And we have reached that point when we read § 3 of c. 1321. Imputability cannot be "seen"; it must be presumed: "After an external violation is committed, *imputability is presumed.*" The point of departure is that the violation was committed consciously and freely. This must be considered normal in the interplay of human relationships and behavior; for both merit and penalty, the point of departure is that the thing has been done consciously and freely.

However, the *CIC* establishes a system of presumption that is less strict than the derogated Code; the new Code continues along the benign lines that have been previously mentioned. *CIC*/1917 established that "posita externa legis violatio, *dolus* in foro externo praesumitur, donec contrarium probetur." Doctrine had justifiably criticized such a strong presumption. In contrast, c. 1321 § 3 establishes that "posita externa violatio, *imputabilitas* praesumitur"; and also, "nisi *aliud appareat.*" This means doubly mitigating the effect of presumption: *a*) the presumption is not that the violation has been deliberately willed ("malice"), but simply that it is imputable—freedom in the act or omission—to the agent (thus, *ex dolo vel ex culpa*); *b*) presumption is interrupted when there is any element causing doubt about its basis: "nisi aliud appareat." Thus, presumption is more reasonably projected onto the generic element (imputability) without entering into specifications of "malice" or culpability. When *CIC*/1917 projected presumption onto the gravest form of imputability, it could be criticized, for that is not completely compatible with the penal principle *in dubio, pro reo.*

Any well-founded doubt is sufficient to destroy the certainty of the presumption;[33] there is no need for the opposite certainty to arise.

33. Cf. V. DE PAOLIS, *De sanctionibus...*, cit., p. 59.

1322 **Qui habitualiter rationis usu carent, etsi legem vel praeceptum violaverint dum sani videbantur, delicti in incapaces habentur.**

Those who habitually lack the use of reason, even though they appeared sane when they violated a law or precept, are deemed incapable of committing an offence.

SOURCES: c. 2201 § 2; PIUS PP. XII, Alloc., 5 dec. 1954 (*AAS* 47 [1955] 61)

CROSS REFERENCES: cc. 11, 97, 99, 1323,6°, 1324,1°–2°, 1325

COMMENTARY

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Before considering exempting, mitigating, and aggravating causes (cc. 1323–1327), the legislator firmly opted to resolve a delicate question that, in prior legislation, gave rise to many uncertainties. It is the case where a person habitually lacks the use of reason, but not so completely that he could not be thought at some time to be able to act lucidly, in which case his acts could be morally imputable to him. *CIC*/1917 called this situation *lucid intervals* (cf. c. 2201 § 2). This is no doubt a complex issue; it would more properly be studied in psychology and psychiatry. Here it is not a question of elucidating whether the situation is or is not possible and under what circumstances; the mere fact that it is possible justifies treatment in the penal area in order to determine imputability.

Canon 2201 § 2 of *CIC*/1917 treated the matter as a *iuris tantum* presumption: "Habitualiter amentes, licet quandoque lucida intervalla habeant, vel in certis quibusdam ratiocinationibus vel actibus sani videantur, delicti tamen incapaces praesumuntur." However, this attempt to refine the treatment of the problem caused many complications when it came to determining what was or was not relevant in refuting the presumption and thus gave rise to numerous doctrinal debates.

The legislator of *CIC* opted to resolve the question definitively in the penal area. Whether it is or is not possible and under what circumstances this situation is possible does not enter into consideration. Because of the possibility of raising doubts about whether this situation is present at a given moment, the legislator established a determining norm: those who habitually lack the use of reason, even if they appear sane when they violate a norm, *are considered incapable* for the purposes of penal law. Or, in

what amounts to the same thing, no uncertainty should be raised; otherwise, there is no penal question.

It is important to emphasize three things in this regard:

a) This is not an application of the principle that a person lacking the use of reason, because he is incapable of performing human acts, is incapable of committing an offense. That is clear from the very concept of offense (see commentary on c. 1321). What is being treated in c. 1322 is a determination of positive law by which the legislator goes beyond what the definition of offense would permit. In some cases, there might be true imputability, but for penal purposes those persons "are considered" to be incapable. As Arias rightly points out, "since penal law is merely an ecclesiastical law, [the legislator] is able to make decisions of this importance without running the risk of touching on the area proper to natural or positive divine law, as long as it is to the advantage of the individual."[1] Making the opposite determination would not be authorized by natural law.

b) The legislator's decision goes beyond what natural law would demand and what is therefore implicit in the very notion of offense. We start with the possibility that in these subjects in some cases, materially, there might be sufficient imputability. Therefore, this canon cannot be considered as an explicit expression of *natural incapacity* (it is implicit in the definition of offense and in that case the canon would be redundant). Instead, the canon determines *legal incapacity.* It goes beyond natural incapacity and includes the broad field of the uncertainties that in some cases might arise in attempting to demonstrate sufficiently grave imputability to proceed to punishment. In that sense, this norm confirms and complements the general *iuris et de iure* presumption in c. 99, and clarifies that it also applies in the penal area, even if the subject appears to have acted with enough lucidity for the act to be considered imputable to him.

c) Under *CIC*/1917, the opposite could be demonstrated because the *iuris tantum* presumption of incapacity was established. Now, however, although in a specific case "lucidity" could be demonstrated with certainty, it would be irrelevant for penal purposes. We have spoken of a *iuris et de iure* presumption (admitting no proof to the contrary), in contrast to the weak presumption of *CIC*/1917. But after all, the least important matter is the juridical designation; the decisive element is the indubitable and positive determination with which the legislator of *CIC* resolves the question.

1. J. ARIAS, commentary on c. 1322, in *Pamplona Com.*

1323 **Nulli poenae est obnoxius qui, cum legem vel praeceptum violavit:**

1° sextum decimum aetatis annum nondum explevit;
2° sine culpa ignoravit se legem vel praeceptum violare; *ignorantiae autem inadvertentia et error aequiparantur;*
3° egit ex vi physica vel ex casu fortuito, quem praevidere vel cui praeviso occurrere non potuit;
4° metu gravi, quamvis relative tantum, coactus egit, aut ex necessitate vel gravi incommodo, nisi tamen actus sit intrinsece malus aut vergat in animarum damnum;
5° legitimae tutelae causa contra iniustum sui vel alterius aggressorem egit, debitum servans moderamen;
6° rationis usu carebat, firmis praescriptis cann. 1324 § 1, n. 2 et 1325;
7° sine culpa putavit aliquam adesse ex circumstantiis, de quibus in nn. 4 vel 5.

No one is liable to a penalty who, when violating a law or precept:
1° has not completed the sixteenth year of age;
2° was, without fault, ignorant of violating the law or precept; inadvertence and error are equivalent to ignorance;
3° acted under physical force, or under the impetus of a chance occurrence which the person could not foresee or if foreseen could not avoid;
4° acted under the compulsion of grave fear, even if only relative, or by reason of necessity or grave inconvenience, unless, however, the act is intrinsically harm or tends to be harmful to souls;
5° acted, within the limits of due moderation, in lawful self-defence or defence of another against an unjust aggressor;
6° lacked the use of reason, without prejudice to the provisions of cann. 1324 § 1 n. 2 and 1325;
7° thought, through no personal fault, that some one of the circumstances existed which are mentioned in nn. 4 or 5.

SOURCES: Canons 2201 § 1, 2202, 2203 § 2, 2204, 2205 §§ 1–4, 2230; CodCom Resp., 30 dec. 1937 (*AAS* 30 [1938] 73); PIUS PP. XII, Alloc., 3 oct. 1953 (*AAS* 45 [1953] 737); PIUS PP. XII, Alloc., 5 dec. 1954 (*AAS* 47 [1955] 61); PIUS PP. XII, Alloc., 26 maii 1957 (*AAS* 49 [1957] 405)

CROSS REFERENCES: Canons 11, 97, 99, 125, 1322, 1324, 1325, 1327, 1345

COMMENTARY

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Circumstances for exemption

1. *Preliminary considerations*

Under title III ("Those Who Are Liable to Penal Sanctions"), this canon treats *exempting causes*. In comparison with *CIC*/1917 (cf. especially cc. 2201ff), the legislator has opted for a much more precise formula. *CIC*/1917 basically treated these circumstances in terms of *imputability*, and they were scattered in various canons. But, in the new Code, the legislator prefers to speak of *non-punishability*. This is a choice that precludes any uncertainty with respect to the exact measure of imputability at a given time and also enables circumstances of a diverse nature to be grouped together.

The heading that precedes the list of causes in the canon is "No one is liable to a penalty ...," meaning no one can be punished, not being subject to the penalty. Subjection to the substantive law—the contents of which are strengthened by the penalty—is another matter; the law is still obligatory. With respect to the *ratio* for which the legislator exempts the penalty, the exempting circumstances listed operate for different reasons.

a) Some are exempt from punishability because they are basically exempt from imputability, and therefore because where they are demonstrated there is no offense. Without delving into the matter, this is the case with inculpable ignorance of the substantive norm (no. 2°), physical force and chance occurrence (no. 3°), grave inconvenience and, by reason of necessity, in the case of merely positive laws (no. 4°), lawful self-defense, even if erroneous through no personal fault (nos. 5° and 7°), and the present lack of the use of reason (no. 6°). In all these cases, one cannot speak of "grave imputability," as required by c. 1321, so there is no offense. The basic reason they are not punishable is non-imputability.

b) The remaining circumstances listed in the canon exempt from punishability for various reasons are due to the positive will of the legislator, without prejudice to the fact that an offense may have been committed. The designation of sixteen years of age (no. 1°) as being "of penal age" does not mean that before that age a fully imputable offense cannot be committed. The same is true for grave fear (no. 4°) that, in itself, is theoretically compatible with the action being imputable.

Without going more deeply into the question, the legislator opts for a solution that seems to be technically correct. He is legislating in terms of punishability, removing as far as possible the uncertainty that could derive

from working in terms of imputability. All this implies greater juridical safety in applying a system of law that is especially sensitive to the justice of the specific case and here to the imposition of penalties.

2. *Circumstances that exempt from punibility*

After explaining the terminology used in the canon, it is apparent why the legislator limits himself to listing the circumstances that exempt from the penalty, without entering into a consideration of the basis for each of them. Let us look at them one by one.

a) *Age* (1°)

The general age of majority is established in c. 97 § 1 at eighteen years. However, when c. 1323 gives the age of sixteen years as the minimum age from which a member of the Christian faithful can be subject to a penalty, it is establishing a *penal* majority that is different from the general age of majority. This is also done by most of secular penal codes. The exempting circumstance established here is not to have *completed* sixteen years. Therefore, anyone who has only begun the sixteenth year remains exempt.

b) *Non-culpable ignorance of an infraction of a substantive norm* (2°)

There is ignorance in anyone who does not know something. Commentators almost unanimously interpret the scope of this exemption in terms of "ignorance of the law or precept" only, perhaps influenced by the inertia of commentaries to *CIC*/1917, where c. 2200 § 1 spoke of "violatio legis ignoratae." But, the terms of *CIC* are not exactly the same; they speak of anyone who "ignoravit se legem vel praeceptum violare": not only anyone who "violated a law that *he did not know about*," but also anyone who "did not know that *he was violating a law*," Thus, there is greater mitigation, because it includes anyone who did not know that there was a law as well as anyone who, even though he could have known it, did not know that at a given time he was violating it.

What is happening here is that the difference is not too important in that the text itself makes both inadvertence and error equivalent to ignorance. The legal text literally designates a de facto presumption of inadvertence or error—perhaps the wording is not as precise as it could be.

In any case, the ignorance must be *inculpable*. It would be culpable and therefore not operable as an exemption if it were totally voluntary, meaning, maintained on purpose so as not to be obligated to comply with what the norm prescribes, or even looking for an excuse to be able to act with impunity (*affected* ignorance): "That kind of ignorance not only does not diminish the imputability of the offense, it indicates the deliberation and care taken in seeking to commit the offense. Thus it does not excuse

from any penalty."[1] Because of the provision in c. 1325 (see commentary), *crass* or *supine* ignorance (nothing was done to learn about the law) should also be considered sufficiently culpable for this purpose, and therefore not exempting.

The same is true in the case of ignorance of the law, even if not crass ignorance, if it concerns the obligation of an office. Even if the ignorance is simply voluntary (*grave*, but not crass; something has been done to know the law, but not enough), here it is the office itself that justifies designating as gravely imputable any action or delinquent omission committed through ignorance. This is because the office carries with it a qualified duty to know the obligations involved; then ignorance is the same as culpable negligence (cf. c. 1389 § 2, which is the only type of culpable offense expressly indicated in the *CIC*).

Note that, in any case, according to c. 15 § 2, this ignorance can never be presumed. This is one of the points where canonical penal law deviates significantly from secular penal legislation. In the secular system, "error iuris" is irrelevant. This highlights the tact with which the canonical legislator treats the subjective element of offenses, or in other words, the exquisite respect always shown for a person's dignity by requiring that human behavior, to be punished, must be absolutely conscious, voluntary and free, with no concession made to the least doubt.

Ignorance and *inadvertence* ("not realizing" that there is a norm that is in fact known) and *error* (wrongly thinking that a certain behavior is legitimate) are made equivalent. To this equivalence, all the previous commentary may also be extended, where applicable.

In sum, ignorance, inadvertence, or error must be concerned with the substantive norm (a norm that orders or prohibits something), not with its penal nature, which is taken up in the following canon with only an attenuating effect.

c) *Physical coercion* (3°)

The wording of the legal text is sufficiently expressive: "who acted under physical force." It is trying to say that physical force is *the reason why* the offense was committed. To put it another way, if there had been no physical force, the offense would not have been committed. The case of someone acting *under* physical violence, but without being able to say that this was the only motivation for the behavior, is a different matter. This exemption is along the lines of the prescription in c. 125 § 1: "An act performed as a result of force imposed from outside on a person who was quite unable to resist it, is regarded as not having taken place." It does not appear that coercion must be described as "irresistible" for it to operate as an exemption. Although in terms of imputability and not simply

1. L. MIGUÉLEZ, commentary on c. 2229, in *Código de Derecho Canónico y Legislación complementaria* (Madrid 1969).

punishability, *CIC*/1917 makes this statement: "vis physica *quae omnem adimit agendi facultatem*, delictum prorsus excludit" (c. 2205 § 1). In a context of punishability, the current norm does not need to make such a demanding distinction; it suffices to say that without coercion, the offense would not have been committed.

We are led to this opinion by an item we consider relevant. Like other exempting circumstances (fear, legitimate defense, error, etc.), if the necessary requisites do not exist that permit them to be exempting, they can at least be mitigating. However, irresistible physical force does not appear in the list of mitigating circumstances (cf. c. 1324 § 1,5°) when it is obvious that, although it does not preclude imputability, physical force does reduce it to the degree that the act is involuntary. For that reason, the legislator purposely attenuates the formulation of *CIC*/1917 and does not reduce the exempting effect of physical force solely to cases where it is irresistible. If it were thus, the exemption could be considered unnecessary in view of the prescription in c. 125 § 1.

d) *Fortuitous case* (3°)

As defined by the legal text, a fortuitous case is one where the result could not be foreseen or, if foreseen, could not be avoided (an example would be that anyone who "throws away the consecrated species" as a result of tripping over something does not incur the penalty of c. 1367). The reason behind the exempting effect is clear; the subjective element is totally absent from the offense, "leaving only physical imputability since there is not moral imputability due to the lack of delinquent will, or, lack of malice or culpability."[2] This is a delicate case, bordering on the "omission of due diligence" that constitutes a culpable offense (cf. c. 1321 § 2). To characterize it properly, perhaps emphasis should be placed not on the unforeseeability or inevitability, but on the irreproachability of the behavior causing harm (as, for example, the case of someone causing death while playing a sport when the licit rules of the game have been observed).[3]

e) *Grave fear, state of necessity, and grave inconvenience* (4°)

Because these three circumstances are treated in one unit by the legislator, we have placed them in a single section. In addition to their proximity to each other, the unifying *ratio* is that, except in cases that are intrinsically harmful or harmful to souls, heroic acts cannot be legislated; behaving with normal diligence to comply with the law is all that may be demanded.[4] Nevertheless, each circumstance should first be studied separately.

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2. F. AZNAR, commentary on c. 1323, in *Salamanca Com.*
3. Cf. E. CUELLO CALÓN, *Derecho penal*, 17th ed., I/2 (Barcelona 1975), p. 544.
4. T. GARCÍA BARBERENA, *Comentarios al Codigo de Derecho Canónico*, IV (Madrid 1964), p. 252.

Fear: "an anxious state of mind caused by a real or imagined risk or harm."[5] In contrast to physical coercion (violence), fear is the consequence of moral compulsion or psychological pressure caused in the subject by the threat of something harm, which in turn threatens his freedom (cf. cc. 125 § 2, 1103).

The qualifier *grave* required for exemption has two variants: *a*) *absolutely* grave, when it is the kind that ordinarily causes a grave disturbance in the person's mind due to the objective nature of the harm or the circumstances surrounding him; *b*) *relatively* grave, when it is grave for a given person although not necessarily for others, after considering the harm in itself and the circumstances of the person suffering from fear.[6] According to the definition of fear that we cited, and since here there is no addition as in c. 1103 of "imposed from without," fear arising from an imaginary cause is also exempting. In this case, the problem would lie in proving it, but theoretically the fact that the fear is not *real* does not mean that it does not have a morally coercive effect upon the subject. Therefore, there is no reason not to consider imagined fear as truly exempting. If fear is not truly grave, a mitigating factor might be considered, in accordance with c. 1324 § 2.

State of necessity: unavoidable conflict between individual rights and obeying the law. It becomes necessary to act against the law if a person is trying to avoid harm to himself or another that would otherwise follow (danger to health or life, good name, goods, etc.). To be considered exempting, the state of necessity must be non-culpable (not intentionally caused), unavoidable (otherwise there would be no true state of necessity), grave (gravity equivalent at least to the duty to obey the law), certain and imminent, due to natural causes (if due to external aggression we would have a case of legitimate defense). It is also necessary that the law is not required to be obeyed because of an assumed voluntary individual obligation (that must be sacrificed because of the office or position). Finally, it appears that there is another requirement: the harm that might follow disobeying the law must not be greater than the harm that is being avoided.

Grave inconvenience: harm or grave and imminent danger of harm, together with—occasionally or by chance—but external to obeying the law (this differentiates it from the preceding case), making compliance disproportionately burdensome for the subject: "It is hardly necessary to point out that this inconvenience is different from the specific inconvenience attached to obeying the law."[7]

The legislator treats these three circumstances in one unit. It is true that all three operate as exemptions, but—the legal text adds—"unless, however, the act is intrinsically harm or tends to be harmful to souls." This

5. REAL ACADEMIA ESPAÑOLA, *Diccionario de la lengua española*, 21st ed. (Madrid 1992).
6. L. MIGUÉLEZ, commentary on c. 1087, in *Código de Derecho Canónico y Legislación complementaria* (Madrid 1969).
7. F. AZNAR, commentary on c. 1323, cit.

is an obvious restriction, in accord with the general moral principle that the end never justifies the means when the means are harmful in themselves (for example, the state of necessity in the case of homicide, violation of the sacramental seal out of fear, or scandalous behavior to save another person would not be exempting). Whenever any of these three circumstances co-occurs with intrinsically harmful acts or acts that result in harm to souls, they can have only an attenuating effect, in accordance with c. 1324 § 1,5° (cf., however, c. 1345 for cases of fear and the state of necessity).

In comparison to *CIC*/1917, the restrictions "contemptum fidei vel ecclesiasticae auctoritatis" (cf. cc. 2205 § 3, 2229 § 3,3° *CIC*/1917)[8] have disappeared. It seems obvious, however, that they should be assumed in the two current cases to the degree that, as Miguélez rightly pointed out apropos of the parallel norm in *CIC*/1917, *a*) this is not the contempt that comes from the agent's intention; it is objective and comes from the very nature of the act or the circumstances; *b*) it is not simply a lack of reverence, honor, or obedience that is implied in breaking a law, but that the delinquent act must be such that it is coupled in a special way with the necessary and direct contempt for faith or authority.[9]

f) *Legitimate defense* (5°)

Legitimate defense is defense—materially implying commission of a delinquent act—needed to repulse actual or imminent and unjust aggression against one's own or another person's rights. The text expressly refers to two of the requirements: *a*) aggression must be *unjust*, that is, against the law (which excludes, for example, "defense" against legitimate acts of force by the authorities)—an offensive act, feigning or using material force to cause harm to a person or his rights, or endangering them, or at least seriously and gravely threatening material and imminent harm.[10] This exemption does not except aggression by a disturbed or intoxicated person. Although in such a case aggression may not be formally unjust because the acts are theoretically not imputable to the aggressor, it is materially unjust to the victim. There would be an exception, however, if aggression were preceded by unjust conduct on the part of the victim, thus exciting or provoking the aggressor; *b*) the other requisite is that *due moderation* be used. This assumes that the means used to defend oneself must be rational; if a person sees another means sufficient to protect from the threat, defense is not necessary and consequently not just. Furthermore, should defense be necessary, it is required that the means used to repel aggression be in proportion to the conditions and seriousness of the attack itself. This should not lead to the absurdity of thinking that there must be identity between the instrument of aggression and the instrument

8. Cf. *Comm.* 8 (1976), p. 178.
9. L. MIGUÉLEZ, commentary on c. 2204, in *Código…*, cit.
10. Cf. E. CUELLO CALÓN, *Derecho penal*, 17th ed., I/1 (Barcelona 1975), pp. 369–370.

of defense; it is the circumstances of the act, place, occasion, means used, condition of the victim, etc. that must be taken into consideration. As Cuello Calón observes, after examining the case and its circumstances, it is sufficient to rationally judge that the defense was necessary and the means adequate, for in the victim's situation, it cannot be supposed that he has sufficient presence of mind for reasoning, calculation, and comparison as he would sitting tranquilly at his desk.[11]

Although suggested in the previous requirements for legitimate defense, other requirements are that *aggression must be actual and unexpected*; otherwise it could easily be vengeance if the aggression had occurred previously, or if it could have been prevented in other ways if it had been foreseen. Obviously, there is no legitimate defense against legitimate defense. Cooperation in defensive action by another person is, naturally, included because the text itself treats of defense against unjust aggression " [by] another," but also because participation in a legal act—and legitimate defense is legal—is not an offense.

g) *Present lack of the use of reason* (6°)

As opposed to the assumption in c. 1322, here we are concerned with someone who *habitually* has the use of reason, but who at the time of acting lacks it because of some transitory mental disturbance, such as intoxication, the effects of a drug, hypnosis, somnambulism, etc.[12] The basis of this exemption is that the acts performed in this condition are not imputable. This text excludes the cases given in c. 1324 § 1,2° ("culpable drunkenness or other mental disturbance of a similar kind") and in c. 1325 ("drunkenness or other mental disturbances cannot be taken into account if these have been deliberately sought so as to commit the offence or to excuse it," a circumstance that cannot even be taken to be attenuating). Cf., however, c. 1345.

h) *Other circumstances for exemption* (7°)

Finally, the legislator fulfills the purpose of mitigation and benignity, or perhaps more precisely, gives another example of delicate respect for human dignity and consequently extra sensitivity in appreciating the subjective element of an offense. He ends the list of circumstances that exempt from punishability by granting exempting effect to mistaken but non-culpable thinking by the person committing the delinquent action. In this specific case, the circumstances of grave fear, state of necessity, and grave inconvenience or legitimate defense would all be present. The possibility of a mistaken but non-culpable judgment that the action was not intrinsically evil or harmful to souls would also be included.

11. Cf. ibid., pp. 374–375.
12. Cf. c. 2201 § 3 *CIC*/1917; L. MIGUÉLEZ, commentary on c. 2201, in *Código*..., cit.

1324 **§ 1. Violationis auctor non eximitur a poena, sed poena lege vel praecepto statuta temperari debet vel in eius locum paenitentia adhiberi,si delictum patratum sit:**

1° ab eo, qui rationis usum imperfectum tantum habuerit;
2° ab eo qui rationis usu carebat propter ebrietatem aliamve similem mentis perturbationem, quae culpabilis fuerit;
3° ex gravi passionis aestu, qui non omnem tamen mentis deliberationem et voluntatis consensum praecesserit et impedierit, et dummodo passio ipsa ne fuerit voluntarie excitata vel nutrita;
4° a minore, qui aetatem sedecim annorum explevit;
5° ab eo, qui metu gravi, quamvis relative tantum, coactus est, aut ex necessitate vel gravi incommodo, si delictum sit intrinsece malum vel in animarum damnum vergat;
6° ab eo, qui legitimae tutelae causa contra iniustum sui vel alterius aggressorem egit, nec tamen debitum servavit moderamen;
7° adversus aliquem graviter et iniuste provocantem;
8° ab eo, qui per errorem, ex sua tamen culpa, putavit aliquam adesse ex circumstantiis, de quibus in can. 1323, nn. 4 vel 5;
9° ab eo, qui sine culpa ignoravit poenam legi vel praecepto esse adnexam;
10° ab eo, qui egit sine plena imputabilitate, dummodo haec gravis permanserit.

§ 2. Idem potest iudex facere, si qua alia adsit circumstantia, quae delicti gravitatem deminuat.

§ 3. In circumstantiis, de quibus in § 1, reus poena latae sententiae non tenetur.

§ 1. The perpetrator of a violation is not exempted from penalty, but the penalty described in the law or precept must be diminished, or a penance substituted in its place, if the offence was committed by:

1° one who had only an imperfect use of reason;
2° one who was lacking the use of reason because of culpable drunkenness or other mental disturbance of a similar kind;
3° one who acted in the heat of passion which, while serious, nevertheless did not precede or hinder all mental deliberation and consent of the will, provided that the passion itself had not been deliberately stimulated or nourished;

4° a minor who has completed the sixteenth year of age;
5° one who was compelled by grave fear, even if only relative, or by reason of necessity or grave inconvenience, if the act is intrinsically evil or tends to be harmful to souls;
6° one who acted in lawful self-defence or defence of another against an unjust aggressor, but did not observe due moderation;
7° one who acted against another person who was gravely and unjustly provocative;
8° one who erroneously, but culpably, thought that some one of the circumstances existed which are mentioned in can. 1323 4° or 5°;
9° one who through no personal fault was unaware that a penalty was attached to the law or precept;
10° one who acted without full imputability, provided it remained grave.

§ 2. A judge can do the same if there is any other circumstance present which would reduce the gravity of the offence.

§ 3. In the circumstances mentioned in § 1, the offender is not bound by a *latae sententiae* penalty.

SOURCES: § 1: cc. 2199, 2201 §§ 3 et 4, 2202 § 2, 2204, 2205 §§ 2 et 4, 2206, 2218 § 1, 2229 § 2 et § 3,2° et 3°, 2230; CodCom Resp. 30 dec. 1937 (*AAS* 30 [1938] 73); PIUS PP. XII, Alloc., 3 oct. 1953 (*AAS* 45 [1953] 737); PIUS PP. XII, Alloc., 5 dec. 1954 (*AAS* 47 [1955] 61); PIUS PP. XII, Alloc., 26 maii 1957 (*AAS* 49 [1957] 405)
§ 2: c. 2223 § 3,3°; PIUS PP. XII, Alloc., 3 oct. 1953 (*AAS* 45 [1953] 737); PIUS PP. XII, Alloc., 5 dec. 1954 (*AAS* 47 [1955] 61); PIUS PP. XII, Alloc., 26 maii 1957 (*AAS* 49 [1957] 405)
§ 3: cc. 2229 § 2, 2230

CROSS REFERENCES: cc. 11, 97, 99, 1314, 1322, 1323, 1325, 1327, 1340, 1345

COMMENTARY

Ángel Marzoa

Attenuating circumstances

1. *Preliminary considerations*

As in the previous canon, in this canon regarding exempting circumstances, the legislator opts to organize in a single block all the circumstances that might lessen imputability and, therefore, be a reason to diminish the established penalty or to substitute a penance.

Before analyzing each circumstance, we should keep in mind the following:

a) As with exempting circumstances, here the legislator is working in terms of *punishability*—the penalty may be attenuated or substituted by a penance. That is, the recapitulating criterion for all attenuating circumstances is the result: a diminished or substituted penalty. For each circumstance, the reason is of a different kind, either the nature of the things (insufficient use of reason, grave impulse in the heat of passion, etc.) or the positive will of the legislator (age, ignorance of the penal norm). The *legislator* tries to refer the elements of imputability, the assessment of which might give rise to uncertainties in applying the norm to areas of certainty and juridical safety (see commentary on c. 1323).

b) The legislator begins with the difference between *grave* imputability—necessary in each case for there to be an offense according to c. 1321 § 1—and *full* imputability (cf. § 1,10°). Full imputability legitimizes the direct application of all the rigor of a penal norm. Grave imputability, however, is the minimum basis for determining whether there is an offense, after which attenuating circumstances may be found. The attenuating effect presupposes the *grave* imputability required by c. 1321 and supplies sufficient cause for punishability, but it does not go so far as *full* imputability. If the penalty is lessened or, if applicable, substituted by a penance, this means that we are working in terms of "ius coactivum," true punishment of an offense; even if it be less grave due to some circumstance preventing the fullness of imputability, it is still an imputable and punishable offense.

c) Whereas in the preceding canon there is an exhaustive list of exempting causes, here the list of attenuating causes is not exhaustive, as seen in § 1,10°.

d) For the circumstances of fear, necessity, influence of passion, and transitory mental disturbance, cf. also c. 1345.

2. *Effects of attenuating circumstances* (§§ 1 and 3)

Theoretically, in the case of attenuating circumstances, one should speak of a single effect, the effect proper to them as attenuating causes. But, canonical penal law has a peculiar method of imposing penalties; together with the ordinary method, by a judicial or administrative procedure (cf. cc. 1341ff), which is for *ferendae sententiae* penalties, there are the *latae sententiae* penalties, which are automatically incurred by the mere fact of committing the delinquent act, with no need for judicial or administrative mediation (see commentary on c. 1314). This means that, in the case of *latae sententiae* penalties, there is no way to comply with the legislator's mandate to "diminish the penalty prescribed... or a penance [must

be] substituted in its place" (§ 1), nor can the judge consider any circumstance that might diminish the gravity of the offense (§ 2). The judge [or superior] does not intervene in the punishment of the offense, which is produced automatically *ope legis*. In this case, the attenuating effect of the circumstances listed in the canon would become inoperable, for the penalty either is or is not incurred—it is automatic—and the offender has no possibility of having the penalty reduced. Therefore, according to the canon, attenuating circumstances have two types of effect:

a) for *ferendae sententiae* penalties, the penalty should be lightened or a penance should be substituted. This is the task of the judge or superior at the time of imposing the penalty (§ 1, *in principio*). In accordance with c. 1345, they may also "refrain from inflicting any punishment";

b) for the purposes of the automatic penalty established by the norm, in the case of *latae sententiae* penalties, an attenuating factor operates as an exempting factor; thus "the offender is not bound" by it (§ 3). As observed by De Paolis, this § 3 is very important in the context of mitigation and mercy in the new penal law: "ne dubia et angustia oriantur ad discernendum num poena incursa sit."[1]

It must be emphasized that here we are concerned with cases where we start with the assumption that there is sufficiently grave imputability to proceed to impose penalties, regardless of its specific effect. This means that, in the case of *latae sententiae* penalties, the penalty established by the norm is not automatically incurred, but, due to the effect of preceptive attenuation, there might be sufficient foundation for the judge or superior in the judicial or administrative procedure to impose a lighter *ferendae sententiae* penalty than what the law or precept establishes.

3. *Circumstances that attenuate (exempt from) punishability*

All the circumstances listed in the preceding canon are attenuating if they lack any of the elements required for them to act as exemptive (those listed in nos. 1°–9° of § 1). The same is true for any other circumstances that could diminish full imputability (no. 10°). With this in mind, see commentaries to cc. 1322 and 1323 for the notion of each of the cases there considered.

a) *Imperfect use of reason* (1°)

This is what *CIC*/1917 called "feeblemindedness," which "diminishes but does not completely eliminate an offense's imputability" (c. 2201 § 4 *CIC*/1917). This attenuating factor corresponds to legal incapacity to commit offenses by those who "habitually lack the use of reason" (see

1. V. DE PAOLIS, *De sanctionibus in Ecclesia* (Rome 1986), p. 61.

commentary on c. 1322). Now we are considering the intermediate possibility between legal incapacity and full capacity: the subject habitually has the use of reason, but diminished. Diminished means *a*) affecting imputability to the same degree, *b*) but not so much that imputability is no longer grave. Thus, there is sufficient basis for penal responsibility and for punishability, although logically the punishment will be attenuated due to the "imperfect use of reason." In sum, it is "imperfect," but it is "use"; consequently, the offense is less imputable, but it is still imputable, and the penalty should be attenuated, but can still be a penalty.

b) *Present and culpable lack of the use of reason* (2°)

In contrast to the preceding case, here we have a subject who habitually enjoys full use of reason. The cause that diminishes it is not internal and pathological, but transitory. This may operate as an exemption according to c. 1323,6° (see commentary). However, if the lack of the use of reason is culpable, meaning, directly intended or not avoided if avoidable, it does cause sufficient imputability of the delinquent act committed in this state (*voluntario in causa*), although it may be diminished with respect to the same offense committed without the influence of this disturbance. Thus, it acts as an attenuating factor (unless in addition to being willed it was intentionally caused in order to commit the offense: cf. c. 1325).

c) *Grave impulse in the heat of passion* (3°)

"The heat of passion" is an intense activity of the senses and as such, influences the act. Passion includes love and hate, desire and aversion, delight and sadness in concupiscible appetite. It also includes hope and boldness, desperation and fear, and anger in irascible appetite. Its effect upon imputability will depend upon whether it is culpable (if the agent deliberately stimulates or nourishes it) or inculpable (when it arises spontaneously rather than by will). The heat of passion is cause for total non-imputability if it precedes and prevents mental deliberation and consent (for example, the so-called *primo-primi* movements due to anger, which are totally blinding). In that case, since there is no truly human act, the elements needed for imputability are lacking and there can be no offense. Simply put, there is no imputable violation (cf. c. 1321 § 1).

The opposite case of the influence of the heat of passion is where passion is deliberately stimulated and nourished; this case is taken up in c. 1325. The impulse of the heat of passion that concerns us now is when passion is inculpable, not directly stimulated or nourished, and "disturbs the mind, riveting attention on the object of affective tendency and more or less forcing the will to follow the direction of passion, thus diminishing freedom."[2] It does not totally remove human quality from the act, but

2. T. GARCÍA BARBERENA, *Comentarios al Codigo de Derecho Canónico*, IV (Madrid 1964), p. 258.

because it was not directly sought, it diminishes the will and therefore also equally diminishes imputability. Therein lies an attenuating effect.

d) *Age* (4°)

Majority for penal age—the legal age for the beginning of capacity to commit offenses—is sixteen years (see commentary on c. 1323). However, the period between penal majority and eighteen years is set by the legislator as the period when an attenuating factor is effective. Anyone who commits an offense and who has already completed sixteen years but has not yet completed eighteen years is subject to the effect of the attenuating factor.

e) *Grave fear, state of necessity, and grave inconvenience* (5°)

Under c. 1323 (see commentary), these three circumstances are exemptions unless the act was intrinsically evil or harmful to souls. This is the case now under consideration; the legislator deems that, even if the act is intrinsically evil or harmful to souls, grave fear, state of necessity, or grave inconvenience still affect (diminish) imputability. Therefore, he establishes the attenuating effect.

f) *Legitimate defense* (6°)

For defensive action in the face of aggression to be legitimate and thus exemptive, one of the requisites is to "observe due moderation." The circumstance the legislator here considers and to which he attributes an attenuating effect is defense when "due moderation" has not been observed and the means used to repel aggression are disproportionate to the type of aggression. However, all other requisites of legitimate defense must be present to produce the attenuating effect: unjust, present, and unexpected aggression, etc. (see commentary on c. 1324).

g) *Grave and unjust provocation* (7°)

This circumstance is close to, but of a different type from, legitimate defense. "Aggression" makes defense legitimate, but it is "provocation" that is now being considered. *To provoke* means with words or actions to invite or stimulate someone to anger.[3] The reason behind this attenuating factor is that the person who acts under provocation does so with diminished responsibility. To find this factor, it is indispensable that the provocation be *immediate* as well as *grave* and *unjust*; otherwise, there would not be the disturbance of mind that justifies the attenuating effect.[4] The wording of the text assumes the following: "provocantem" assumes that the provocation was present when the offense was committed ("against another person who was ... provocative," not "against a person who had ... provoked").

3. Cf. T. GARCÍA BARBERENA, *Comentarios al Codigo de Derecho Canónico*, IV (Madrid 1964), p. 255.
4. Cf. ibid., pp. 255–256.

h) *Culpable erroneous judgment* (8°)

Canon 1323 establishes as exempting factors grave fear, state of necessity, and grave inconvenience, provided that they do not imply committing an act that is intrinsically evil or harmful to souls (no. 4°), and legitimate defense observing due moderation (no. 5°). It also grants exemptive effect to cases where the agent, without culpability on his part, erroneously thought that one of these circumstances was present (no. 7°) (see commentary on c. 1323). The circumstance here designated as attenuating is the one described in c. 1323,7° as exempting, but when erroneous judgment is culpable. In spite of culpability, the legislator sees diminished imputability that justifies attenuating or substituting the penalty (for the question of culpability in erroneous judgment, see commentary on c. 1323, on ignorance).

i) *Non-culpable ignorance of the penal nature of the norm* (9°)

Canon 1323,2° (see commentary) considered non-culpable ignorance of the substantive norm to be exempting. What is here considered as attenuating is ignorance, also non-culpable, of the penal norm, that is, of the law or precept that, in addition to imposing or prohibiting certain behavior (substantive norm), establishes a penalty for those who violate it.

An explanation needs to be made here. As he did with the parallel exempting factor in c. 1323,2° (cf. 2202 § 1 *CIC*/1917), now too the legislator moves away from the wording of *CIC*/1917 (cf. c. 2202 § 2). Although in the first case the change of wording does not affect the substance of the exempting factor, here the text does modify the scope of the attenuating factor. Canon 2202 § 2 of the *CIC*/1917 spoke of "ignorantia solius poenae"; that is, it considered that ignorance of *the penalty* was attenuating—the direct object of ignorance would be *the penalty.* But, this norm says "*ignoravit* poenam legi vel praecepto *esse* adnexam." Here, one can no longer consider the penalty to be the object of ignorance, but "that a penalty was attached to the law or precept," as translated correctly into English. In other words, the legal text does not use a verb and noun direct object ("*ignorare poenam* legi vel praecepto adnexam"), but a verb and a complementary infinitive phrase (Latin) or clause (English) ("*ignorare* poenam legi vel praecepto *esse adnexam*"). This is not merely a *lis de verbis,* because it affects the basic content; the real attenuating factor that this canon is designating is more restricted that its parallel canon in *CIC*/1917. It is insufficient to be ignorant of the specific penalty established for the case, but one must not know that *there is a penalty* for this anti-juridical act. For example, it would be attenuating if someone did not know that abortion is punished with a penalty. It would not be attenuating if someone knew of the penalty but did not know that the penalty was excommunication. Considering that the vernacular versions of the legal text that we have been able to compare are faithful, it is surprising that the majority of commentators do not give sufficient relevance to the changed text; perhaps they were

influenced by the inertia of the commentators to *CIC*/1917, who adequately reflected what the norm of c. 2200 § 2 established.[5]

In any case, ignorance that "a penalty was attached to the law or precept" does not eliminate imputability from the delinquent act since, for an act to be imputable, it is unnecessary that the author know the act carries a penalty in the law. It is sufficient that he know that it is anti-juridical, that he know the law and realize that the act is a violation of the law."[6] But, at the same time, the legislator wants to attribute to this ignorance an effect that attenuates imputability, "because anyone who commits an offense with knowledge that the law includes a penalty (or simply, knowing generally the act is penalized) demonstrates greater malice and greater danger because he places his personal views before both the preceptive or prohibitory law and the penal law. This indicates that not even the condemnation of the law is sufficient to keep him from committing the crime."[7]

j) *Other attenuating circumstances* (10°)

Finally, the legislator recognizes the possibility of other attenuating circumstances different from those listed (nos. 1°–9°), but that like those which in some way diminish imputability in such a way that it is still *grave*—otherwise there would be no offense—it is not quite *full* enough of imputability for the penalties provided to be imposed in all rigor. Therefore, the legislator establishes a kind of *open-ended attenuating factor*: "one who acted without full imputability, provided it remained grave." There is a problem with the effect of this attenuating factor on *latae sententiae* penalties, for it is the offender himself who should be the first to judge whether or not he has incurred the penalty. It seems that the effect would have to be moved to the possible time this type of penalty is declared (see commentary on c. 1341). Then, the judge or superior must judge the possibility that there may have been some circumstance in the commission of the offense to prevent *full* imputability. Then he would not declare imputability or, if he did, it would be with mitigation. In that case, we would be in the area of § 2, thus no. 10° can be considered hardly operative.

5. Cf. e.g., J. ARIAS, commentary on c. 1323, in *Pamplona Com*: "la ignorancia de la pena aneja"; F. AZNAR, commentary on c. 1324, in *Salamanca Com*: "la ignorancia de la pena aneja"; F. NIGRO, "Liber VI. De sanctionibus in Ecclesia," in *Commento al Codice di Diritto Canonico* (Rome 1985), p. 765: "la sola ignoranza della pena"; L. CHIAPPETTA, "Le sanzioni nella Chiesa," in *Il Codice di Diritto Canonico* (Naples 1988), p. 444: "l'ignoranza... della pena annessa"; V. DE PAOLIS, *De sanctionibus*..., cit., p. 60: "ignorantia... poenae adnexae." Those who present the issue with some degree of precision include: F. COCCOPALMERIO, "La Normativa penale della Chiesa," in *La Normativa del Nuovo Codice*, 2nd ed. (Brescia 1985), p. 330: "l'ignoranza... della esistenza di una pena"; and T.J. GREEN, commentary on c. 1324, in J.A.CORIDEN-T.J. GREEN-D.E. HEINTSCHEL (Eds.), *The Code of Canon Law: A Text and Commentary* (New York 1985), p. 903: "the person... unaware that a penalty is attached to its violation."

6. T. GARCÍA BARBERENA, *Comentarios al Codigo de Derecho Canónico*, IV (Madrid 1964), p. 243.

7. Ibid.

4. *An open attenuation* (§ 2)

In imposing the penalty, when the judge or superior acts (*ferendae sententiae* penalties, or declaration of *latae sententiae* penalties), because the mechanism for imposing penalties is authentically juridical, it allows a more precise evaluation of the specific case and an appreciation of circumstances that is impossible in the automatic mechanism of *latae sententiae* penalties. The legislator leaves to the judge or superior (cf. c. 1342 § 3) the possibility of finding relevance in cases where there may be "any other circumstance that would reduce the gravity of the offense" in order to attenuate the penalty or substitute a penance ("can do the same").

If we compare this norm with c. 1344 (see commentary), we see that the judge's or superior's powers in applying penalties are very broad. What is interesting to note here is that this § 2 broadens the field of possibilities for attenuation. If the list of circumstances in § 1 basically remits us to questions of imputability (*grave* but not *full*), § 2, when it speaks of the circumstances that may diminish "the gravity of the offense," is broadening the field. The gravity of the offense can derive from the subjective element (*graviter imputabilis*) or from the objective element (where all the factors come into play that in one way or another could diminish the degree of social harm the external violation of a norm could produce).

Consequently, § 2 leaves the judge or superior ample margin to judge and to give attenuating effect to any circumstance that might affect *full* imputability (although this is already deducible from § 1,10°), and to any other circumstance that in a general way could diminish the gravity of the specific offense.

1325 Ignorantia crassa vel supina vel affectata numquam considerari potest in applicandis praescriptis cann. 1323 et 1324; item ebrietas aliaeve mentis perturbationes, si sint de industria ad delictum patrandum vel excusandum quaesitae, et passio, quae voluntarie excitata vel nutrita sit.

Ignorance which is crass or supine or affected can never be taken into account when applying the provisions of cann. 1323 and 1324. Likewise, drunkenness or other mental disturbances cannot be taken into account if these have been deliberately sought so as to commit the offence or to excuse it; nor can passion which has been deliberately stimulated or nourished.

SOURCES: cc. 2201 § 3, 2206, 2229 §§ 1 et 3,1°

CROSS REFERENCES: cc. 1323, 1324, 1345

COMMENTARY

Ángel Marzoa

Circumstances which do not affect the punishability of the offense

Some of the circumstances treated in cc. 1324 and 1325 as possibly exempting or attenuating merit attention in this canon due to certain peculiarities that might alter their attenuating or exempting effect. These are drunkenness and other similar disturbances, and the heat of passion (see commentary on cc. 1324 and 1325).

Theoretically, if there were no c. 1325, its content could be deduced without further explanation from the contents of the lists of attenuating and exempting circumstances. But, the legislator wanted to avoid all possibility of uncertainty by expressly naming the cases in which ignorance, drunkenness, or passion neither exempt nor attenuate.

A peculiar willfulness detected in the genesis of a delinquent action acts as the *ratio* that unifies all the circumstances here discussed. Although it may very well be diminished at the time of committing the delinquent act, willfulness nourishes the cause by which, at that moment, the agent may not be sufficiently free: "in istis casibus habetur peculiaris culpa in causa."[1]

1. V. DE PAOLIS, *De sanctionibus in Ecclesia* (Rome 1986), p. 62.

Thus, the following factors do not have an exempting or attenuating effect:

a) peculiarly grave ignorance: *affected* (deliberately sought so as not to be caught by knowledge of the law); *crass* and *supine* (nothing was done to learn about the law);

b) drunkenness or other mental disturbances (drugs, hypnosis, somnambulism, etc.), deliberately sought to commit the offense, or trying to produce a circumstance to excuse it;

c) passion that has been deliberately stimulated or nourished.

1326 **§ 1. Iudex gravius punire potest quam lex vel praeceptum statuit:**

1° eum, qui post condemnationem vel poenae declarationem ita delinquere pergit, ut ex adiunctis prudenter eius pertinacia in mala voluntate conici possit;

2° eum, qui in dignitate aliqua constitutus est, vel qui auctoritate aut officio abusus est ad delictum patrandum;

3° reum, qui, cum poena in delictum culposum constituta sit, eventum praevidit et nihilominus cautiones ad eum vitandum omisit, quas diligens quilibet adhibuisset.

§ 2. In casibus, de quibus in § 1, si poena constituta sit latae sententiae, alia poena addi potest vel paenitentia.

§ 1. A judge may inflict a more serious punishment than that prescribed in the law or precept when:

1° a person, after being condemned, or after the penalty has been declared, continues so to offend that obstinate ill-will may prudently be concluded from the circumstances;

2° a person who is established in some position of dignity, or who, in order to commit an offence, has abused a position of authority or an office;

3° an offender who, after a penalty for a culpable offence was constituted, foresaw the event but nevertheless omitted to take precautions to avoid it which any careful person would have taken.

§ 2. In the cases mentioned in § 1, if the penalty constituted is *latae sententiae,* another penalty or a penance may be added.

SOURCES: § 1: cc. 2203 § 1, 2207, 2208, 2223 § 1

CROSS REFERENCES: c. 1321

COMMENTARY

Ángel Marzoa

Aggravating circumstances

1. *Preliminary considerations*

Canon 1323 treats of circumstances that exempt from punishability, and c. 1324 treats attenuating circumstances. The present canon lists a series of circumstances that add a certain gravity to the actual gravity of the

offense, and thus allows the punishment to be increased. Aggravation lies not in the offense itself—its specific nature is not altered—but in the person who commits the offense. It lies in the special bad intention of the offender in the first and third cases, and in the special malice presumed by the situation of dignity, authority, or office taken advantage of by the person committing the offense in the second case.

The effect of exempting and attenuating circumstances was assessed by the legislator in terms of *punishability,* without entering into a detailed consideration of greater or lesser imputability (cf. cc. 1323–1324). When establishing aggravating circumstances, the legislator works in the same terms; he describes the cases with regard to the possibility of increasing the penalty without entering into a detailed consideration of greater or lesser imputability, although that is the *ratio* for the aggravating circumstance.

It should be noted that, in contrast to the treatment of exempting and attenuating circumstances, application of which is preceptive ("No one is liable to a penalty ..." in c. 1323; "the penalty ... must be diminished" in c. 1324), aggravating circumstances are taken into consideration at the discretion of the judge or superior. This is consistent with the *in bonam partem* principle, universally recognized in penal scope. For the same reason, the list in this canon deviates from the parallel norm in *CIC*/1917, c. 2207, by being restrictive and contrasts with the *open-ended* description of attenuating circumstances (cf. c. 1324 § 1,10° and § 2). This does not preclude the introduction by particular law or precept, according to c. 1327, of other aggravating circumstances that are effective only where these norms are in effect.

2. *Effects of the aggravating circumstances*

The increase in penalty permitted by these aggravating circumstances should be considered separately for *ferendae sententiae* and *latae sententiae* penalties. This is only logical, since the method of incurring the penalty—by the judge or superior's condemnation, or automatically—necessarily conditions the way in which the aggravating circumstances described in the canon may be effective.

a) For *ferendae sententiae* penalties (§ 1), "a judge may inflict a more serious punishment than that prescribed in the law or precept." The text does not say "increase the penalty," but "inflict a more serious punishment." This appears to mean that the legislator leaves to the prudence of the judge or superior whether to increase the penalty established in the penal norm or substitute another more grave penalty, or finally, to add another penalty to the established penalty.

b) For *latae sententiae* penalties (§ 2), which are automatically incurred by the very act of committing the offense, with no possibility of

judicial or administrative mediation, the only thing a judge or superior can do is to *add* another penalty or a penance to what has already been automatically incurred. Obviously, this can only be done after declaring the *latae sententiae* penalty (cf. cc. 1441ff).

3. *Circumstances that can aggravate the penal sanction*

a) *Specific reincidence.* Juridical reincidence can be of two kinds: *a*) generic: the mere fact that someone has committed several offenses (simple accumulation of offenses); and *b*) specific: the case where, after having been condemned, someone again commits the same kind of offense. This canon is concerned only with the second type. Generic reincidence is covered in c. 1346, not in terms of aggravated circumstances, but treating the various accumulated penalties in someone who has committed several offenses (see commentary on c. 1346).

Specific reincidence theoretically presumes that there is greater obstinacy in evil on the part of the offender; therefore, the circumstance is treated as aggravating. But, the legislator does not wish to elevate this presumption to the category of absolute norm; therefore, he specifies that, in addition to the offender's having been condemned—or the *latae sententiae* penalty declared—"obstinate ill will may … prudently be concluded from the circumstances." Therefore the judge or superior, in applying the aggravating circumstance of reincidence, must determine *a*) prior nonrecurring condemnation or declaratory sentence; *b*) commission of a new offense of the same type; c) whether the circumstances are truly evidence of obstinate ill will.

To apply the aggravating circumstance, it is debatable whether the new offense must be of the same type as the cause of prior condemnation or declaratory sentence. This canon makes no such specification, in contrast to c. 2208 *CIC*/1917, which said, "commits an offense *of the same type* again." We, however, think that the specification of the old canon should be referenced for interpreting the new canon, especially if considering that c. 1346 simply speaks of the "offender [who] has committed a number of offenses," with no reference to c. 1326. This seems to indicate that the legislator deemed generic reincidence, without aggravating circumstances, to be different from specific reincidence, as treated in this canon.[1]

With respect to determining from the circumstances that "obstinate ill will may prudently be concluded," the section of c. 2208 § 1 *CIC*/1917: "… in such circumstances *of fact and principally of time*, which may be

1. However, opposed to this and more faithful to the literal meaning of the legal text, cf., e.g., F. AZNAR, commentary on c. 1326, in *Salamanca Com.*

prudently conjectured ..." may be helpful. It would be difficult to speak of obstinate ill will if a long time had passed between the first condemnation and the second offense.

b) *Status of the offender. CIC*/1917 considered the condition of both the offender and the victim as possible aggravating factors (cf. c. 2207,1°). Now the victim's condition is not considered to be a general aggravating factor,[2] although the legislator did specifically consider it in certain offenses (cf. c. 1370). Canon 1326 includes only the condition of the person who commits the offense. This condition acts as an aggravating factor in two cases: *dignity*, which juridically is the external characteristic of a person that proceeds from a position or office held or even from honorific rights granted by the public authority and causing others to give that person special respect or reverence; and *the authority or office* held by the offender. These are two distinct aggravating factors. The first is due to "the greater scandal and special disturbance of the ecclesial order caused when the author of a violation of the law is an important person in the Church"; the second to "the greater perverseness or anti-juridical intent"[3] that are presumed to protect confidence in those carrying out the duties of governance in the Church, so important for social life.

It is notable that the second aggravating circumstance is like an addition to the first. Anyone in the Church who holds an office or position derives acknowledged dignity from it. But, it is not the same to act *unworthily*—the first case—as to do so also *taking advantage* of the position or office. A greater responsibility for the office-holder is presumed, and abusing the power of the office or position destroys confidence in it. To summarize, the mere act of committing an offense of any kind is sufficient to find aggravation if the offender is invested with dignity; but if in addition the offense is committed *with abuse* of authority or office, it constitutes a stronger degree of aggravation.[4]

c) *Foreknowledge and negligence.* In c. 1321 (see commentary), malice and culpability are established as sources of imputability. Theoretically—and in most cases, in practice—it is easy to see the difference between a "deliberate violation of the law" and a "violation due to the omission of due diligence." Determining the exact line of separation between the two is not, however, such a simple task.

The case considered by this canon as an aggravating circumstance sits squarely on the borderline between the two possibilities, making it difficult to determine exactly. Between malice and culpability, intermediate

2. Cf. *Comm.* 8 (1976), pp. 180–181.
3. F. AZNAR, commentary on c. 1326, cit.
4. In addition to the general figure of this canon, the "aggravating" factor of office incorporates the delictive types in cc. 1386 and 1389; and appears expressly as aggravating factor—with the indication of the corresponding penalty— in cc. 1364, 1367, 1370, 1378, 1390, etc.

cases are possible where, even though they cannot be clearly said to be a "deliberate violation" (malice), the anti-juridical behavior is due to something more than mere "omission of due diligence" (culpa), because "it was foreseen what was going to happen." This is known as *culpability with foresight*, considered in practically the same terms in *CIC*/1917 (cc. 2203 § 1), where the legislator, speaking of culpable offenses, limited himself to saying that, in the indicated case, "the culpable offense borders on malice." The penal norm now considers this case under aggravating factors, by virtue of which the judge or superior may increase the punishment.

Thus, the aggravating circumstances of foreknowledge and negligence together have the following elements: *a*) a culpable offense is typified; *b*) the subject foresees what might happen (the anti-juridical result); *c*) and in spite of that, consciously fails to take the precautions that any diligent person would take to avoid it. The cause that converts the case to aggravation is *foreknowledge*; without foreknowledge, the offense is merely culpable, but foreknowledge causes negligence to be qualified by greater gravity. This is no longer merely the omission of due diligence, but omission foreseeing the anti-juridical event that might ensue. Thus, there is stronger culpability and, consequently, responsibility is greater. When designating the offense, the legislator establishes a penalty for simple negligence. When negligence is aggravated by foreknowledge, the aggravating factor is reasonable. As an example: under c. 1389 in regard to c. 530,3°, the parish priest's mere culpable offense when, through the omission of due diligence, he fails to duly attend a sick person who in fact dies without his assistance is not the same as the case where the parish priest can see that the parishioner may die immediately and nevertheless does not use ordinary diligence, with the result that the patient dies without proper pastoral attention.

1327 **Lex particularis potest alias circumstantias eximentes, attenuantes vel aggravantes, praeter casus in cann. 1323–1326, statuere, sive generali norma, sive pro singulis delictis. Item in praecepto possunt circumstantiae statui, quae a poena praecepto constituta eximant, vel eam attenuent vel aggravent.**

A particular law may, either as a general rule or for particular offences, determine excusing, attenuating or aggravating circumstances, over and above the cases mentioned in cann. 1323–1326. Likewise, circumstances may be determined in a precept which excuse from, attenuate or aggravate the penalty constituted in the precept.

SOURCES: cc. 2207, 2221

CROSS REFERENCES: cc. 8 § 2, 13 § 1, 49, 1315, 1316, 1319

COMMENTARY

Ángel Marzoa

Circumstances that exempt, attenuate, or aggravate, established by particular law or precept

As a result of, and consistent with, the principle established in cc. 1315 and 1319, the universal legislator recognizes the possibility that other exempting, attenuating, or aggravating circumstances may be established by particular law or precept. Since c. 1325 is referenced in this canon, it must be understood that in no case can certain circumstances be considered to be exemptive or attenuating; these are crass, supine, or affected ignorance, drunkenness or other intentionally provoked mental disturbances, and deliberately stimulated passion.

In addition, this norm appears to be very logical; immediate knowledge of reality acquires particular relevance for evaluating specific circumstances. The task is easier for the particular legislator or author of the precept, because he is much closer to reality. In any case, the unifying criterion postulated in c. 1316 must be kept in mind.

There is one notable difference between the possibilities of particular law and the possibilities of a precept:

a) Exempting, attenuating, and aggravating circumstances may be established by *particular law* (cf. cc. 8 § 2 and 1315) as a general norm, as well as for a specific offense. This means that circumstances may be

established that are applicable to any offense in the entire area where this law is in effect, regardless of whether the offense derives from a particular norm or from a universal norm, or the circumstances may be applicable only to a specific offense.

b) Exempting, attenuating and aggravating circumstances may also be established by *precept* (cf. cc. 49 and 1319), but they are applicable only to the penalty established by the same precept. This means that the circumstances may be established only within and for the effects of a penal precept and are not applicable to other precepts.

1328 **§ 1. Qui aliquid ad delictum patrandum egit vel omisit, nec tamen, praeter suam voluntatem, delictum consummavit, non tenetur poena in delictum consummatum statuta, nisi lex vel praeceptum aliter caveat.**

§ 2. Quod si actus vel omissiones natura sua ad delicti exsecutionem conducant, auctor potest paenitentiae vel remedio poenali subici, nisi sponte ab incepta delicti exsecutione destiterit. Si autem scandalum aliudve grave damnum vel periculum evenerit, auctor, etsi sponte destiterit, iusta potest poena puniri, leviore tamen quam quae in delictum consummatum constituta est.

§ 1. One who in furtherance of an offence did something or failed to do something but then, involuntarily, did not complete the offence, is not bound by the penalty prescribed for the completed offence, unless the law or a precept provides otherwise.

§ 2. If the acts or their omissions of their nature lead to the carrying out of the offence, the persons responsible may be subjected to a penance or to a penal remedy, unless he or she had spontaneously desisted from the offence which had been initiated. However, if scandal or other serious harm or danger has resulted, the perpetrator, even though spontaneously desisting, may be punished by a just penalty, but of a lesser kind than that determined for the completed crime.

SOURCES: § 1: cc. 2212 §§ 1 et 3, 2213 § 1, 2224 § 3
§ 2: cc. 2212 § 2, 2213 §§ 2 et 3, 2235

CROSS REFERENCES: cc. 1321, 1339–1340

COMMENTARY

Ángel Marzoa

The attempted offence

1. *The "iter criminis." Preliminary concepts*

For an offense to be considered truly committed (see commentary on c. 1321), in addition to the subjective element ("graviter imputabilis") and the legal element ("externa legis vel praecepti violatio"), the objective element must be verified. The act must harm the social juridical interest that the penal norm is attempting to protect. For that to be so, the external

act originating the social harm must be completed, meaning that it must include all the pre-established elements in the design of the offense made by the penal norm.

But consummation of the offense does not always occur in the same way; it depends on the type of offense. There are some offenses where the antijuridical result occurs almost instantaneously, so that the violation and the consummated offense are inseparable (for example, under c. 1369, the offense of blasphemy uttered in the midst of social communication, where the fact of uttering it is in itself a consummated offense). But, there are other offenses where the beginning of the violation is separable from consummation, and the antijuridical result occurs after a number of phases or stages (for example, in c. 1398, abortion is the result of death after manipulating the fetus). In the second case, therefore, performance of the offense is composed of several successive acts that are susceptible of being considered separately. Thus, consummation occurs when the last stage is in place, when *social harm* is verified. So there can be acts in which the complete sequence is leading to a consummated offense, but it is interrupted and not completed. Here we have an *imperfect offense* or *attempted offense*: "aliud est crimen, aliud conatus; hic in itinere, illud in meta."[1]

An *attempted offense*, however, also has variants. In order to understand them, canonical doctrine has used a description of the different stages that lead to a consummated offense, known as the *iter criminis*. Consummation of an offense presumes *a*) an internal psychological process (idea, plan, purpose); and *b*) and an external process in which there occur a series of divisible acts in preparation and execution. The internal psychological process takes place in the internal forum (the seat of moral culpability), and to the degree that there is any possibility of proof, will be relevant to a determination of juridical-penal imputability. As this process is not accessible from the external forum proper to juridical-penal jurisdiction but is required to reach a decision of punishability ("graviter imputabilis"), the penal system has recourse to the presumption of imputability after the external violation has been noted (see c. 1321 § 3 and commentary). This internal process is exteriorized (thence the justification for said presumption) through preparatory and executive/consummative acts. Simple *preparatory* acts are considered to be acts that are not yet a part of the integral criminal action properly speaking; they are simply for preparing the offense, acquiring the means, removing obstacles, etc. These acts in themselves are ambiguous with respect to the offense that is about to be committed; in themselves they do not necessarily and unequivocally lead to it. *Executive* acts, however, form an integral part of the criminal action properly speaking. Through them, social harm begins to occur; therefore, they fall within the framework of the typified offense.

1. ALCIATUS, *Ad legem XLIII, De verborum significatione*, 39.

They are univocal acts, by their very nature they lead unequivocally to the offense.

Taking the subjective element (intention) as a given, to be able to speak of an attempted offense, truly *executive* acts must at least have begun to be performed. Acts that are simply *preparatory* are irrelevant to the offense, in the sense that they might be performed for any other activity, and thus are not sufficient to justify the presumption of delinquent intention (regardless of any moral judgment that might be made of such acts, with sufficient intention). For example, sufficient presumption to impute the attempted offense of burglary to a subject cannot be based on the fact of buying a ladder. Thus, it is necessary for *executive* acts to have been begun; then we have an attempted offense. To pursue a previous example, someone who furtively places a ladder under someone else's window or is caught in a neighbor's house, although he has not yet completed a burglary, is clearly performing acts that unequivocally lead to an offense and can be considered to be as serious as an attempted offense. Acts that complete the whole process and round out the delinquent concept are considered by doctrine, within executive acts, to be *consummative.*

Let us suppose that the act is not consummated. It will still be an attempt, but the attempt may be *perfected* or *imperfect.* A perfected act is one where all acts have been performed that by their nature lead to consummation, but for reasons outside the will of the agent, the delinquent effect is not produced. This case is known as a *frustrated* offense. It is also possible to fail to consummate the offense either because the agent desisted from his purpose or because the means used were insufficient or inadequate; then we have an imperfect attempt or truly *attempted* offense.

An *attempted* offense may be described as a true offense in itself (cf., for example, c. 1391: forgery of a public document is supposedly perpetrated for personal use and advantage, but the legislator wishes to consider the mere act of forgery as an offense). This is the case where we have an *attempted offense*: an offense consummated for its kind, and therefore outside our consideration, for it already carries its own penalty.

Doctrine speaks of still another form that is absolutely theoretical, but if we understand it, it can serve to mark the boundaries of an attempted offense. We are speaking of an *impossible offense*, which is the case where consummation is not reached because in the phase of executive acts, the acts are inadequate—not merely insufficient—to achieve a delinquent result (for example, trying to poison someone by exchanging a harmless drink with a poison), or because the object of the planned delinquent intention does not exist (for example, trying to cause an abortion when the fetus is already dead). It is clear that, in these cases, regardless of the moral attributes of the intention, the "result" is absolutely irrelevant to penal law.

Now that we have summarily described the *iter criminis* as a guide to understanding the different forms that may occur in an attempt, let us now move on to consider this institution in *CIC*/1917, for some of its content may be of great use in understanding the current legislation.

2. *Treatment of the attempted offense in CIC*/1917

In contrast to *CIC*, the prior legislation treated attempted offenses in various and scattered places. First, it gave a definition of the different cases: c. 2212 described *attempted offenses* (§ 1), *frustrated offenses* (§ 2), *ineffectual instigation* (§ 3) and the *offense of attempting* (§ 4). Canon 2213 established the pertinent principles of imputability in the various cases. Canon 2224 § 3 established the principle of non-cumulative penalties for attempt and consummation of the same offense, and finally, c. 2235 determined punishability.

With respect to definitions, they all agree with what we said in the preceding section of this commentary. As for imputability, the principle is established that an attempt "has its imputability" and the degree of gravity depends on how proximate was a consummated offense. A frustrated offense is graver than a simple attempt. Spontaneous desistance, except for scandal or other grave harm or danger, acts to exempt from all imputability. With respect to the penalty, attempted and frustrated offenses "may be punished with any proportionate penalty ..."

3. *Process of revision*

In the revision of *CIC*'s legislation a linear process can be seen for this question. The starting point is the principle that "the norms regarding the attempted and frustrated offense should be mitigated so that the frustrated attempt not be punished with any penalty, but only with penal remedies and penances (even if they are facultative), unless scandal or any other grave harm can arise from the attempted offense (in which case the punishment would also be facultative)."[2] All of the terms of this principle serve to inspire c. 14 of the *Schema* of 1973. This first draft of the canon was the object of many comments: whether the forms of attempted and frustrated offenses should be defined; whether to simplify the norms even further, for the matter lacks importance; whether to state expressly that in cases of "omission," antijuridicality is required; the elimination of certain expressions; consideration of the "impossible offense" or even whether to

2. Code Commission, *Schema Documenti quo disciplina sanctionum seu poenarum in Ecclesia latina denuo ordinatur* (Typis Polyglottis Vaticanis 1973), p. 7.

remit the question to state laws.[3] The fact is that none of these proposals was taken into account, and the text passed into *CIC* as we now have it.

Of all this, the important thing to remember is the inspiring intention to mitigate penal treatment of attempts. In relation to c. 2235 of *CIC*/1917, this is principally evident in referring possible punishment to the areas of penances or penal remedies, and reserving the possibility—still optional—of imposing penalties only in cases of scandal or grave harm or danger. In any case, this very traditional form from classical law is retained in current legislation.

4. *The attempted offense in CIC*

a) *Consideration of the distinct forms*

In a single canon—which we are now discussing—the Code covers all the norms concerning attempted or incomplete offenses. This is justified by the fact that, like the circumstances that modify imputability in cc. 1323–1326, the question is treated directly in terms of *punishability,* without any consideration of the different degrees of gravity of imputability that depend upon the various assumptions for attempted or incomplete offenses. We have a simplification of legislation that in this case does not help immediate comprehension of everything concerning this form, whereas the mitigation of its penal treatment is quite clear. The fact is that we do not find the terms *attempted* or *frustrated,* etc., among the terms used in c. 1328. As we have seen, there were petitions to define the different forms, but the answer given was that it did not appear to be necessary, since punishment in all cases is facultative.[4] This reasoning is not very convincing, because adequate distinctions could offer the judge or superior objective criteria upon which to base his option of punishing or not punishing, and to determine the degree of punishment.

If for the moment we put aside the separation into paragraphs—which was done to consider the canon from the point of view of punishability, by reading the canon we can differentiate two generic cases: *a*) non-consummation for reasons outside the will of the agent; *b*) non-consummation by spontaneously desisting. Keeping in mind what was just said, we can situate frustrated offenses and attempted offenses that are due to insufficiency of means in the first group. In both cases , the offense is not consummated for reasons beyond the agent's control. For the second group, only an attempt to commit an offense due to desisting can be situated there. But, both cases should be given a double test that will

3. Cf. *Comm.* 8 (1976), p. 182.
4. Cf. ibid.

determine punishability: that from the attempt, scandal, or other grave harm or danger either follows (§ 2) or does not follow it (§ 1).

To summarize, we are led to the following possibilities:

1°) attempted offense due to spontaneous desistance, without scandal or other grave harm;

2°) attempted offense due to insufficiency of means, without scandal or other grave harm;

3°) frustrated offense, without scandal or other grave harm;

4°) attempted offense due to spontaneous desistance, with scandal or other grave harm;

5°) attempted offense due to insufficiency of means, with scandal or other grave harm;

6°) frustrated offense, with scandal or other grave harm;

7°) attempted offense, when the law or a precept provides a penalty for the attempted or frustrated offense.

Although the canon does not mention it, by exclusion we should also keep in mind the possibility of the "impossible offense"; this is the case in which an offense is not committed, not due to insufficiency of means, but to total ineptitude (confusing sugar with poison), or because the object does not exist (shooting at a corpse). It is important to remember this limitation so as to keep the forms of attempted and frustrated offenses separate from it, since they are properly juridically and penalty imputable. In the case of an "impossible offense," there is absolutely no imputability.

b) *Punishability of the different suppositions*

We must begin by saying that—as c. 2213 *CIC*/1917 said—the wording of this canon clearly implies that "an attempt at an offense has imputability, which is greater in the degree to which it nears the consummation of the offense, but lesser overall than if the offense were consummated." But, we must remember that with respect to imputability, by the express will of the legislator there is an exemption—if the author spontaneously desists (§ 2). But—necessarily on the basis of whether there is imputability, otherwise it would make no sense—the legislator brings up the question of punishability: whether or not in each case the attempted offense should be punished. To so determine, he establishes the following: if the law or precept expressly determines a specific punishment for the attempt (§ 1 *in fine*), then we have a case of *attempted offense* (the example cited of document forgery, or also attempted matrimony). If the law or precept is silent on the matter, then anyone found to fulfill the conditions of an attempted offense is not subject to the penalty established for a consummated offense (this is a rather quaint affirmation of § 1 because it is so obvious). But the author may be punished with penances or penal remedies, provided that the degree of the attempt is not due to spontaneous

desistance. Even so, if the attempt results in scandal or other grave harm, then even in the case of desistance the agent may be punished with a just penalty. Obviously it is just that said penalty be less than the penalty established for a consummated offense.

For greater clarity, for the question of punishability, we offer the same organization of possibilities as in the preceding paragraph:

1°) *not punishable* (§ 2);

2°) facultative *penances or penal remedies* (§ 2);

3°) facultative *penances or penal remedies* (§ 2);

4°) facultative lesser *penalties* than those specified for the consummated offense (§ 2);

5°) facultative lesser *penalties* than those specified for the consummated offense (§ 2);

6°) facultative lesser *penalties* than those specified for the consummated offense (§ 2);

7°) punishable in accordance with the norm that establishes the offense (§ 1).

As those who asked for further definitions of attempted and frustrated offenses had foreseen, what was supposed to be a simplification of the norms on them has become a canon of complex wording that can only be brought out of obscurity by the light of penal doctrine concerning the form of the offense. The new *CIC* is correct in avoiding the thorny question of definitions, which are more proper to doctrine than to legislative technique, but in this case, the technique itself demands the use of precise and universally recognized technical terms. It does not appear to be adequate to avoid definitions and also to eliminate technical terms, for then interpreting the norm becomes a virtually impossible task.

5. *Non-efficacious instigation*

In c. 2213 § 3, *CIC*/1917 said that "one can liken to an attempt to commit an offense the action of someone who has tried, even without success, to induce another to commit an offense." As defined in that Code, this is one of the types of cooperation that belongs in c. 1329 *CIC* as a form of complicity and one that by virtue of that canon (see commentary) has its own imputability. Thus, the form of "non-efficacious instigation" would be equivalent to an attempted offense in the case of a jointly committed offense. Is this case relevant in *CIC* when there is no parallel norm to c. 2212 § 3 *CIC*/1917? Theoretically, and taking this canon literally, it would appear not. At least one commentator has openly declared so;[5]

5. Cf., e.g., F. AZNAR, commentary on c. 1328, in *Salamanca Com.*

most others, however, do not even mention the possibility. The question could be considered to be a mere *quaestio elegans*. In any case, there is a *type* of offense in the current norms that actually corresponds to this form; this is the case in c. 1373: "A person who publicly incites his or her subjects to disobedience against the Apostolic See or the ordinary ..." In the legal design of this type of offense, there is no requirement that the attempted result of disobedience be effectively achieved. It is then proper to speak of an attempted offense (of instigation). However, since this case is designated as an autonomous offense regardless of the result (here the law does "provide otherwise," c. 1328 § 1), it becomes an *attempted offense*. This enables us to think that "non-efficacious instigation" in any other case of offense that so permits can be deemed to be an attempted offense; consequently, the provisions of c. 1328 may be applicable to it.

1329 **§ 1. Qui communi delinquendi consilio in delictum concurrunt, neque in lege vel praecepto expresse nominantur, si poenae ferendae sententiae in auctorem principalem constitutae sint, iisdem poenis subiciuntur vel aliis eiusdem vel minoris gravitatis.**

§ 2. In poenam latae sententiae delicto adnexam incurrunt complices,qui in lege vel praecepto non nominantur, si sine eorum opera delictum patratum non esset, et poena sit talis naturae, ut ipsos afficere possit; secus poenis ferendae sententiae puniri possunt.

§ 1. Where a number of persons conspire together to commit an offence, and accomplices are not expressly mentioned in the law or precept, if *ferendae sententiae* penalties were constituted for the principal offender, then the others are subject to the same penalties or to other penalties of the same or lesser gravity.

§ 2. In the case of a *latae sententiae* penalty attached to an offence, accomplices, even though not mentioned in the law or precept, incur the same penalty if, without their assistance, the crime would not have been committed, and if the penalty is of such a nature as to be able to affect them; otherwise, they can be punished with *ferendae sententiae* penalties.

SOURCES: § 1: cc. 2209, 2211, 2230, 2231
§ 2: cc. 2209 §§ 3 et 4, 2211, 2230, 2231

CROSS REFERENCES: cc. 1314, 1343, 1349

COMMENTARY

Ángel Marzoa

I. CO-DELINQUENCY

This canon schematically presents the question of co-delinquency. As in most cases, the legislator limits himself to considering co-delinquency from the point of view of punishability and does not—as he did in c. 2209 *CIC*/1917—delve into the distinctions that may arise among the multiple forms of co-delinquency. However, in the commentary, we must

of necessity occupy ourselves with them to establish the criteria to apply the canon to specific cases.

Canon 1329 is placed in part I of book VI. From the point of view of the overall organization of the book, this means that it must be taken into consideration when applying the canons in part II whenever there might be a presumption of co-delinquency. In other words, this is a general norm that must be applied to all special norms unless they "expressly mention" a co-delinquent; in that case the penalty provided in the special norm will be applied. For example, c. 2350 *CIC*/1917 mentions "those who procure an abortion, including the mother ..." The wording of c. 1398 *CIC*, however, is more restrained, in the singular, and without explicit mention of the mother: "A person who actually procures an abortion ..." From the point of view of legislative technique, the later wording is more correct; the supposition is typified and to apply it, recourse must be had to the general norm, c. 1329.

II. NOTIONS

A. *Co-delinquency*

1. *Concept*

Also called "joint commission of an offense" in doctrine, *co-delinquency* is the case in which various physical persons cooperate in a single delinquent action.

This means that there is a single basis for imputability: a single offense that is imputed to each of the co-delinquents. This principle of unity is essential to the concept of co-delinquency. Participation in the offense does not mean that there are as many offenses as offenders, nor that the offense is broken up to impute one part to each co-delinquent. The same offense is attributed to each person who participates in committing it (single basis for imputability), each one to the degree of his participation (diverse responsibility).

2. *Requirements*

The activity of each person cooperating must be *delinquent*, and they must all be *in agreement*; there must be unity in the objective and subjective elements:[1]

1. Cf. T. GARCÍA BARBERENA, in *Comentarios al Código de Derecho Canónico*, IV (Madrid 1964), pp. 264–265.

a) The *objective element* assumes that the different activities converge to cause the same criminal harm or result. There is no complicity in any post-offense activity. In this regard, the explicit provisions in § 7 of c. 2209 *CIC*/1917 continue to be valid: "praising the committed delict, participating in its fruits, harboring or protecting the delinquent, and other acts posterior to the act fully carried out ... do not carry with them the imputability of the committed delict."

b) The *subjective element* requires that all co-delinquents agree that they intend to perform the same delinquent deed. This means that agreement of intention in a single offense (co-delinquency) is one thing, and the mere material coincidence of several persons with the intention to commit the same offense is another irrelevant for the purposes of co-delinquency. In the second case, there is no co-delinquency because there is no will to commit the offense by common accord and with mutual cooperation. For example, the implication of several persons in a fight in which someone dies is not necessarily a form of co-delinquency; it would only be so if the persons causing the death participated consciously and willfully as a group.

B. Forms of cooperation

Since the degree of participation in an offense is decisive for punishability, let us look at the various forms of co-delinquency or cooperation that could occur:

1. *Total* cooperation: when two or more persons participate physically and simultaneously by common accord in the same delinquent act. In this case, we speak of *co-authors* and *co-authorship*. In some cases, this comes from the nature of the offense. For example, adultery requires the participation of two persons; in that case, we speak of *co-delinquents*.

2. *Partial* cooperation: when a co-delinquent provokes someone to commit an offense or participate in it, but does not perform the consummative act. In this case we speak of *accomplices* and *complicity*. Complicity has two variants of great importance for punishability. It may be

a) *Principal*: the cooperative activity is necessary for performing the delinquent act (a *necessary* accomplice);

b) *Accessory*: the cooperative activity facilitates performance of the delinquent act, but the act could have been performed without the cooperation (*accessory* accomplice);

It is important to point out that the adjectives "principal" or "accessory" refer to the *activity*, not to the person performing it. Thus, a person performing an activity without which the offense would not be possible is a principal accomplice; that is why the principal accomplice would be the one who carries out the activity without which the delict would not have

been possible, and also why the principal accomplice cannot make the excuse that if he or she had not done it, someone else would have.

In addition, complicity may be *physical* or *moral*, depending upon whether the accomplice participates in the malice and the harm, or only directly in the malice and indirectly in the harm. Moral complicity includes the following: *mandate,* when the offense is committed for the benefit of the principal; *instigation*, when the offense is committed for the benefit of the person provoked; and *association,* when the offense is committed for the benefit of both.

III. PRINCIPLES OF APPLICATION

If we keep in mind these requisites about the nature of the forms of co-delinquency, we can deduce the following general principles for punishability:

1. Modifying circumstances arising from the objective element affect all co-delinquents equally. Since there is only one basis for imputability, a single offense, everything affecting it will equally affect each of the co-delinquents, for example, if the offense is frustrated (see commentary on c. 1328).

2. Modifying circumstances arising from the subjective element affect only the co-delinquents affected by it. The common will that is the presumption for co-delinquency is the result of the will of each person; but each person must be considered individually in his singular phenomenology: for example, age, possible ignorance, fear, etc., in each of the co-delinquents.

3. A co-delinquent suffers a punishment equal to or lesser than the principal author's by reason of personal capacity and the nature of his cooperation.

IV. PUNIISHABILITY OF CO-DELINQUENCY IN ITS DISTINCT SUPPOSITIONS

Because of the attempt at simplification, the wording of this canon is not clear in explaining the punishability of the various types of co-delinquency. The criteria for treatment in two paragraphs divided by the type of penalty obscures the variants of co-delinquency. A rapid reading could lead to the belief that § 1 considers *co-authorship* ("a number of persons conspire together to commit an offense") and § 2, *complicity*

(accomplices ..., if without their assistance, the crime would not have been committed"). But this interpretation would lead to the illogical consequence that accomplices would be unpunished in cases with *ferendae sententiae* penalties, and we would not know what to expect in the case of *co-authors* of offenses punished with *latae sententiae* penalties which could not be incurred because they are specific.

Therefore, based on the explanation of the basic variants of co-delinquency (authorship and complicity; principal and accessory complicity), we present an outline of the application of the principles established in the paragraph preceding the different variants. Offenses punished with *latae* or *ferendae sententiae* penalties are considered separately. In addition, the penalties may be *common* (applicable to any faithful) or *specific* (not applicable to any faithful, for example, suspension).

All of the above assumes that, as the canon itself says, the co-delinquents "are not expressly mentioned in the law or precept"; otherwise the special norm determining the penalty to be imposed in the specific case will take precedence over this general norm.

At the time of drawing up this canon, a first draft (*Schema* of 1973) established facultative penalties for § 1. However, the wording commission accepted the petition that the penalties be preceptive, and so it was in the final writing.[2] This circumstance gives greater strength to the treatment of the imputability of the various types of co-delinquency and the intention that it be duly punished. But still, this rectification breaks the balance between the two paragraphs, for in the offenses punished with *latae sententiae* penalties, if the co-delinquent does not incur them because they are specific, punishment is only facultative. Still theoretically, we conclude that because the offense is punished with automatic penalties, the legislator deemed it to be of greater gravity.

Thus, we pass on to an outline of punishability according to this canon.

A. Co-authors

1. Offenses punished with *latae sententiae* penalties (§ 2): do incur the same penalty. If the penalties are specific and cannot be applied to the co-delinquent, optionally, *ferendae sententiae* penalties (understood to be of equal or lesser gravity) are to be applied.

2. Offenses punished with *ferendae sententiae* penalties (§ 1): preceptively, the same penalty or one of equal or lesser gravity must be imposed.

2. Cf. *Comm.* 8 (1976), p. 183.

B. *Principal accomplices*

1. Offenses punished with *latae sententiae* penalties (§ 2): incur the same penalty. If the penalties are specific and cannot be applied to the co-delinquent, optionally, *ferendae sententiae* penalties (understood to be of equal or lesser gravity.

2. Offenses punished with *ferendae sententiae* penalties (§ 1): preceptively the same penalty or one of equal or lesser gravity must be imposed.

C. *Accessory accomplices*

One might think that the canon does not intend to address this case. But, if we look at its literal wording, it cannot be excluded. Paragraph 1 speaks generically of "persons [who] conspire together to commit an offence." This wording, strictly speaking, includes accessory complicity. Therefore, along the lines of principle, it appears that accessory complicity has its own imputability, and the canon includes the possibility of punishing it, although always optionally, and naturally with a lesser punishment. Specifically:

1. Offenses punished with *latae sententiae* penalties (§ 2): that penalty is not incurred. Optionally, *ferendae sententiae* penalties (understood to be necessarily of lesser gravity).

2. Offenses punished with *ferendae sententiae* penalties (§ 1): optionally, other penalties (understood to be necessarily of lesser gravity).

1330 **Delictum quod in declaratione consistat vel in alia voluntatis vel doctrinae vel scientiae manifestatione, tamquam non consummatum censendum est, si nemo eam declarationem vel manifestationem percipiat.**

An offence which consists in a declaration or in some other manifestation of will or of doctrine or of knowledge, is not to be regarded as effected if no one actually perceives the declaration or manifestation.

SOURCES: —

CROSS REFERENCES: cc. 1321, 1371,1°, 1373

COMMENTARY

Ángel Marzoa

Canon 1321 (see commentary) establishes external violation of a law or precept as a necessary element for an offense. Canon 1330 should be interpreted in that context.

1. To see the importance that this norm may have, we must look back to *CIC*/1917, where c. 2197 divided offenses into *public* and *occult*. For *CIC*/1917 an occult offense was "one that is not public," placing the entire burden of clarifying the concept on the definition given for a public offense. In the words of the canon, a public offense was one that "was already widely known, or was committed or is situated in such circumstances that one can and should prudently judge that it will become widely known as a matter of course."

The distinction between "public" and "occult" lay not in the type of violation of the law, that necessarily had to be external (cf. c. 2195 *CIC*/1917), but in the effect the violation had upon the community when perceived by it. The social harm that justified designating an action as an offense, and its punishability, appear linked to the fact that the community in some manner perceived the fact of the violation. Breaking the law was not sufficient basis to be able to speak of a deed in itself as an offense; the violation had in some way to be "social." Consistent with this and with the nature of criminal jurisdiction, c. 1933 § 1 *CIC*/1917 established that "delicts which fall under criminal jurisdiction are public delicts." This last canon, together with others that restricted the exercise of coercive powers to the environment of public offenses (cf., e.g., cc. 990, 2312 § 2), caused explanations of what should be taken as "public" to have great

relevance in *CIC*/1917. According to c. 2197, what was "public" depended upon divulgence or divulgeability. That explains why the concept has been copiously studied by commentators. What does "divulged" mean? (What are the minimum number of persons who should be aware of it, the characteristics of the social group that knows about the deed, etc.?) And especially, what does "divulgeable" mean? (What are the types and circumstances of the persons who have knowledge of the fact of the offense to determine to what degree it may be presumed that it will easily pass on to others?)

It is important to emphasize that the external quality of the offense was not questioned; it was the fact of its "divulgence" or public nature. Together with all of that there is the concept of the occult offense—naturally, also an external violation—and its penal treatment, especially with *latae sententiae* penalties. It is important to emphasize that "public" in *CIC*/1917 was the opposite of "occult," and never the opposite of "internal," because "externality" was in all cases an essential element of offenses under c. 2195.

This division of offenses is not expressly made in *CIC*, although, to the degree that *latae sententiae* penalties continue, an occult offense must be relevant in current legislation. In fact, the "necessity" of not leaving occult offenses unpunished was one of the strongest arguments for preserving this type of penalty: "Consultores censent unanimiter poenas *latae sententiae* (...) non posse penitus supprimi, quia unicum praebent medium aptum ad tutandum bonum animarum quod in discrimen venire potest per quaedam delicta oculta."[1] It is debatable whether this is the "only appropriate means" to that end; but the fact that there are occult offenses in the new legislation is clear. However, the *CCEO* did not consider this necessary (cf. c. 1408, which recognizes only penalties imposed by means of a sentence or a decree).

2. With these precedents in mind, we can consider c. 1330. It has been said that "it resolves a doctrinal debate over the scope and significance of the *external* quality of an offense" by determining that acceptance, that is alterity, is necessary.[2] But, perhaps the wording of the canon does not allow going so far. The legislator is working in terms of *punishability,* and what the canon says is not that there is no offense—it does not try to address that question—but that for the purposes of *punishability* (the canon falls under tit. III: "Those Who Are Liable to Penal Sanctions") the offense is "not considered to be consummated." This expression may be taken in two senses: *a*) that there is indeed an offense, but the legislator opts not to consider it as consummated for the purposes

1. Cf. *Comm.* 8 (1976), p. 171. With reference to the crime of abortion, cf. *Comm.* 9 (1977), p. 317.
2. J. ARIAS, commentary on c. 1330, in *Pamplona Com.*

of punishability (the norm actually speaks of "delictum"); *b*) that if there is an offense—without trying to say expressly that there is one, it will not be considered as consummated for penal purposes.

In any case, what is important is the effectiveness of the norm. If there is no perception, this type of offense will never be considered as a consummated offense and consequently cannot be proceeded against penally, nor will it incur the *latae sententiae* penalty that is established. The legislator's decision on this point is perfectly legitimate and technically correct; it resolves a problem in the application of penal norms without raising new problems. No matter what the nature of the offense in this case, it will not be punished because it is *not considered* consummated. Actually, the first draft said that "delictum consummatur cum aliquis eam manifestationem percipiat," which assumes a position taken on a basic question: the consummation of an offense. Now it says, moving voluntarily away from the basic question: "tamquam non consummatum censendum."

As evidence that the legislator did not wish to enter deeper into the question there is the fact pointed out by De Paolis that initially this canon was placed immediately after the present c. 1311, as the second canon of the book.[3] This would have given rise to an interpretation that an attempt was being made to change or further describe the very notion of offense, as if to affirm that in addition to being external, violation of the law or precept in some cases had to be accepted by someone. For that reason, it was preferred to move it to its current position as the last canon in tit. III and therefore, as we have brought out, within the context of requirements for punishability.[4]

Thus, c. 1330 refers exclusively to a special type of offense, and its application operates in terms of punishability. The notion of offense, based on the external character of violation of a law or precept (c. 1321), undergoes no changes.

3. With regard to the types of offense directly referred to in the canon, there has also been a development in their description. Initially, the 1973 *Schema* spoke of cases of offense that consisted of a "manifestatio animi vel mentis."[5] The ambiguity of these terms led to their being substituted by "quod in declaratione consistat vel in alia voluntatis vel doctrinae vel scientiae manifestatione," indicating more precisely the types of offense to which the legislator wished to refer. Thus, for example, the offenses in cc. 1371,1° or 1373 are included in these cases.[6] In all of them and

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3. Cf. Code Commission, *Schema Documenti quo Disciplina sanctionum seu poenarum in Ecclesia latina denuo ordinantur* (Typis Polyglottis Vaticanis 1973), p. 16 (c. 2).
4. Cf. *Comm.* 8 (1976), pp. 168–169; V. DE PAOLIS, *De sanctionibus in Ecclesia* (Rome 1986), p. 66.
5. Cf. Code Commission, *Schema Documenti*..., cit.
6. Cf. for a summary of the debate around the canon: *Comm.* 8 (1976), pp. 168–169.

in other offenses that fall within the scope of these characteristics under universal or particular law, for the offense to be considered consummated and thus susceptible to penal sanctions, at least one other person must perceive the statement or manifestation of intention (someone had requested that acceptance be "public"; but that proposal was not accepted, for the legislator did not want to prevent an offense perceived by a single person from being considered to be such[7]).

7. Cf. ibid.

TITULUS IV
De poenis aliisque punitionibus

TITLE IV
Penalties and Other Punishments

INTRODUCTION

Ángel Marzoa

After stating that the Church has the right to punish with penal sanctions and listing the types of canonical sanctions (tit. I), the sources of canonical penal law and the criteria that must be followed in penal legislation (tit. II) and covering everything that concerns passive subjects of penal sanctions (tit. III), tit. IV of part I treats "penalties and other punishments." This is done in three chapters that correspond to the listing in c. 1312: *censures* (chap. I), *expiatory penalties* (chap. II), and *other punishments*, meaning penal remedies and penances (chap. III). The respective definitions will appear in the commentary on each canon (see introduction to part I for the concept of penalties in general).

Although the general title of the book covers the generic concept of "sanctions in the Church," here "Penalties and Other Punishments" are directly addressed. Apart from other considerations that might underlie the final choice of the book's title (see introduction to book VI: *The Question of the Title*), what seems to be now emphasized is that within the penal system, canon law has two different types of sanctions. Some are strictly penal (censures and expiatory penalties) insofar as they punish *offenses*, and others ("use is also made ...:" c. 1312 § 3) are not strictly penal in nature (penal remedies and penances), for they do not necessarily assume the commission of offenses in the strict sense. This provides grounds for speaking of a hybrid penal system (penalties and other sanctions), but still truly and strictly penal with regard to medicinal and expiatory penalties.

Finally, there is another question to be concerned with before commenting on each canon in this title. The legislator has positively wanted to avoid definitions as far as possible. This explains, for example, that while *CIC*/1917 began its treatment of penalties with a definition of each one (cf. cc. 2241: definition of *censure*; 2257: definition of *excommunication*; 2268: definition of *interdict*; 2278: definition of *suspension*; 2286: definition of

vindictive penalties, now *expiatory*; 2306–2313: description of *penal remedies* and *penances*), the legal treatment of each penalty now begins with a description of its effects without first giving definitions, "quae ad doctorum magis quam ad legislatoris pertinent officium."[1]

This fact should be kept in mind, so as not to incur the error of trying to understand the nature of canonical penalties simply by the description of their effects, thus separating them from their rich doctrinal tradition that is condensed in the *CIC*/1917 definitions. This would conflict with the legislator's intention, which, through the inspiring principles of the reformed code, remits the task of definition to doctrine. It would also mean renouncing the scientific task of the jurist and being limited to the convenient *legalistic* attitude to construct definitions by *stringing together* legal texts.

This can be seen especially clearly, for example, in the case of the penalty of excommunication. If we adhered to c. 1331 literally to define a juridical-penal institution with such rich doctrinal content (it is one of the canonical institutions to which classical decretalists have dedicated the most space) in addition to being an egregious error in method, it would be like *starting afresh* with no connection to the instances referred to in, for instance, c. 19, and would be totally unrelated to the continuity of tradition on which canon laws are based.

1. *Comm.* 2 (1970), p. 101.

CAPUT I
De censuris

CHAPTER I
Censures

1331 **§ 1. Excommunicatus vetatur:**

1° ullam habere participationem ministerialem in celebrandis Eucharistiae Sacrificio vel quibuslibet aliis cultus caerimoniis;

2° sacramenta vel sacramentalia celebrare et sacramenta recipere;

3° ecclesiasticis officiis vel ministeriis vel muneribus quibuslibet fungi vel actus regiminis ponere.

§ 2. Quod si excommunicatio irrogata vel declarata sit, reus:

1° si agere velit contra praescriptum § 1, n. 1, est arcendus aut a liturgica actione est cessandum, nisi gravis obstet causa;

2° invalide ponit actus regiminis, qui ad normam § 1, n. 3, sunt illiciti;

3° vetatur frui privilegiis antea concessis;

4° nequit valide consequi dignitatem, officium aliudve munus in Ecclesia;

5° fructus dignitatis, officii, muneris cuiuslibet, pensionis, quam quidem habeat in Ecclesia, non facit suos.

§ 1. An excommunicated person is forbidden:

1° to have any ministerial part in the celebration of the Sacrifice of the Eucharist or in any other ceremonies of public worship;

2° to celebrate the sacraments or sacramentals and to receive the sacraments;

3° to exercise any ecclesiastical offices, ministries, functions or acts of governance.

§ 2. If the excommunication has been imposed or declared, the offender:

1° proposing to act in defiance of the provisions of § 1 n. 1 is to be removed, or else the liturgical action is to be suspended, unless there is a grave reason to the contrary;

2° invalidly exercises any acts of governance which, in accordance with § 1 n.3, are unlawful;
3° is forbidden to benefit from privileges already granted;
4° cannot validly assume any dignity, office or other function in the Church;
5° does not enjoy the benefits of any dignity, office, function or pension held in the Church.

SOURCES: § 1: cc. 2255–2267
§ 2: cc. 2259 § 2, 2260, 2261 § 3, 2263, 2264, 2265 § 2, 2266, 2267

CROSS REFERENCES: cc. 135, 145, 1109, 1318, 1335, 1352

COMMENTARY

José Bernal

1. To excommunicate means to separate a person from communion. Every society has the right to expel a member who attacks the fundamental goods of the community or the rights of others. From its very beginnings, the Church has made use of this right, bequeathed to it by Jesus Christ. The Gospel According to Matthew says, " ... if he refuses to listen even to the church, let him be to you as a gentile and a tax collector" (Mt 18:17). A specific example is found in the Epistles of St. Paul, when the apostle orders the faithful of Corinth to expel the incestuous man from the Church.[1] Many writings of the Church fathers, conciliar and pontifical documents, using various terms ("excommunicate," "throw out of the Church," "separate from the Church," etc.), mention exclusion of an offender from the community of the faithful, and the gravity of this penalty is made clear.

Because of the variety of exceptions, the concept of excommunication was not clearly determined, although the distinction between separation from the Church caused by sin, and separation caused by imposing this penalty due to committing grave offenses was perceived. As a penance, the excommunicate was prevented from approaching the Eucharist or the divine offices until he or she repented. Excommunication proper (greater or mortal) was applied for the offenses of heresy, schism or apostasy, using the *anathema* or *anathema maranatha*. In that case, the excommunicate was left pending the judgment of God. A faithful who

1. Cf. 1 Cor 5:5. Regarding the scope and sense of this text, cf. J. ARIAS, *La pena canónica en la Iglesia primitiva* (Pamplona 1975), pp. 39–49; V. DE PAOLIS, *De sanctionibus in Ecclesia. Adnotationes in Codicem. Liber VI* (Rome 1985), pp. 30–31.

communicated with the excommunicate was given lesser excommunication, which had less severe effects. With the passage of time, the distinction between greater excommunication and *anathema* or *anathema maranatha* nearly vanished; only the circumstances and external solemnities observed in the imposition remained to differentiate them. Over the centuries, the distinction between greater and lesser excommunication was weakened. When the list of automatic penalties was made in the Constitution *Apostolicae Sedis* (October 12, 1869),[2] there was no mention made of lesser excommunication.

The term "excommunication" has become consolidated since the sixth century. At the same time, it has come to include the idea of censure or medicinal penalty, although it still covers penalties of diverse types. Lateran Council III[3] legally sanctioned the need for a prior admonition before imposing excommunication. Innocent III[4] officially declared that excommunication should always be considered a censure. Thus, without prior admonition, there could be no excommunication.[5] It could not be imposed for a limited time (as could vindictive penalties), and an excommunicate who repented and repaired the harm deserved absolution.

2. In the current Code, c. 1331 is limited to listing the effects of excommunication ("An excommunicated person is forbidden ..."), leaving its definition to doctrine and jurisprudence in fidelity to the principles governing the reform of canon law.[6] In contrast, c. 2257 *CIC*/1917 says, "Excommunication is a censure by means of which a person is excluded from the communion of the faithful, with the effects indicated in the following canons and which cannot be separated." The following canons give us specific repercussions of the loss of communion,[7] namely that the excommunicated person cannot receive the sacraments, the strongest expression of communion.

3. The Council of Trent defined excommunication as the "sinews of ecclesiastical discipline."[8] In the concept and regulation of excommunication, the ultimate foundation of the penal system of the Church can be found. To understand the faithful's manner of being and working in the

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2. *ASS* 5 (1869), pp. 305ff.
3. Cf. *X* II, 28, 26.
4. Cf. *X* V, 40, 20.
5. Cf. *VI* V, 11, 13.
6. Cf. *Comm.* 2 (1970), p. 101; 9 (1977), pp. 147–148; *Schema Documenti quo disciplina sanctionum seu poenarum in Ecclesia latina denuo ordinatur* (Typis Polyglottis Vaticanis 1973), pp. 5–6.
7. Cf. A. MARZOA, "Los delitos y las penas canónicas," in *Manual de Derecho Canónico*, 2nd ed. (Pamplona 1991), p. 746.
8. Cf. *Sessio* XXV, c. 3, *de reformatione*. An important precedent for such an affirmation can be found in JOHN DE ANDRÉS (cf. ANDREAE, *Apparatus in Clementinas*, V, *De sententia excomunicationis*, fol. 67, col. 1, Lugduni 1543). In regards to this subject and of other historical aspects of the penalty of excommunication, one can consult A. MARZOA, *La censura de excomunión* (Pamplona 1985).

Church, one must start with the concept of *communio*. *Communion* has an ontological root that arises from baptism and is never lost because of the indelibility of the sacramental quality to which it is essentially united. Communion also has two dimensions that are mutually implied but differentiable, the mystical and the juridical.

The mystical dimension of communion (or internal communion, as it is frequently expressed in classic doctrine) refers to the insertion of the faithful into the Mystical Body of Christ. As the fruit of grace and charity, it can be lost through mortal sin and, to its fullest degree, by loss of faith. By its very nature, this supernatural dimension remains outside the competence of the Church's power of governance; therefore, it is outside canon law.

In contrast, the juridical dimension of communion (or external communion) is materialized in the juridical relationships through which the faithful is actively present in the Church's juridical structure, specifically in the bonds of the profession of faith, the sacraments and the ecclesiastical system (c. 205).[9] In its juridical dimension, communion can be lost only through a constitutive act by the authorities, by virtue of which the faithful is deprived of the goods or rights that the Code lists in c. 1331 and that are necessary and inseparable effects of excommunication as a canonical penalty.

When the penalty of excommunication falls upon an especially grave offense, it is assumed that grace or communion in its mystical dimension is also lost, although such a statement implies only an assumption that does not prejudge the interior state of the offender. The concept of excommunication contained in the penal norm refers only to the loss of "juridical communion."[10]

4. Canon 1331 specifies the effects of excommunication. The excommunication system varies depending on whether excommunication is undeclared *latae sententiae*, declared *latae sententiae* or *ferendae sententiae* (for these concepts, see commentary on c. 1314). When the faithful incurs the penalty *latae sententiae*, the fact may not be known publicly and, in such situations, canon law will always take into account that offenders are not obligated to give evidence against themselves. Consequently, when the reputation of the excommunicate might be harmed, the law does not insist that the penalty be given (cf. c. 1352 § 2). If excommunication has been imposed or declared, the penalty will be publicly known as a matter of law. The offender's situation will be obvious to the community, with the aggravating factor that performing prohibited acts

9. Cf. A. MARZOA, *Comunión y Derecho* (Pamplona 1992), *pro manuscripto*.
10. Cf. J. ARIAS, commentary on c. 1331, in *Pamplona Com.*

will cause even greater scandal. Therefore, it is understandable that the legal prohibitions in this case are more rigorous.[11]

a) For the effects of undeclared *latae sententiae* excommunication (§ 1), the canon establishes certain prohibitions that make contrary acts illicit, not invalid. To be invalid, they must be expressly so declared (cf. c. 10), as occurs in § 2. In addition, in the work of reform, it was made clear that the use of *vetare* did not imply that the prohibited acts were invalid.[12]

The norm contains three explicit prohibitions:

1°) *To have any ministerial part in the celebration of the Sacrifice of the Eucharist or in any other ceremonies of public worship.* This prohibition refers to active participation by ministers at Mass or any other ceremony of public worship. The 1973 *Schema* prohibited the excommunicate from any participation (*ullam habere participationem*). If this wording had been retained, the resulting norm would have been more severe than the parallel norm in *CIC*/1917 (c. 2259), which permitted the excommunicate to participate passively. To indicate that the prohibition referred specifically to the participation of a minister, the expression *ministerial part* was introduced.[13] Therefore, this provision affects those who have received the sacrament of orders, those who perform a lay ministry (cf. c. 230) and lay people to whom the power of assistance at marriage has been delegated (cf. c. 1112). In those cases, the minister does not act personally but in the name of and together with the entire Church. However, no excommunicated minister is prohibited from attending a ceremony of worship, although he will not be able to receive communion.

2°) *To celebrate the sacraments or sacramentals and to receive the sacraments.* The greatest novelty of the 1973 *Schema* and the drafts of the first working sessions of the *Coetus* was the possibility that an excommunicate could receive the sacraments of penance and the anointing of the sick. This was intended to avoid conflict between the internal and external fora. However, it meant a deep break with the Church's centuries-old praxis and doctrine, which had always referred to the exclusion of *all* sacraments by excommunication as an indivisible effect.

This measure also gave rise to a number of conceptual difficulties. If the excommunicate is by definition *outside* the Church's communion, how could he or she have access to the sacraments, even a few of them, which are the most genuine manifestation of communion? In spite of the fact that the members of the *Coetus* were always in favor of introducing this

11. Cf. A. CALABRESE, *Diritto penale canonico* (Milan 1990), p. 116.
12. Cf. *Comm.* 9 (1977), p. 148.
13. Cf. ibid., pp. 148–149.

modification, it was vetoed in the May 1977 Plenary Session[14] and the substantial elements of the classical concept of excommunication, with its inseparable effects, were utilized.

Therefore, according to current discipline, an excommunicate is not prohibited from receiving the sacramentals. The prohibited reception (sacraments) or celebration (sacraments and sacramentals) of them is not invalid, except in the case of the sacrament of penance, due to lack of the proper provisions. In any case, the provisions of cc. 1335 and 1352 must be taken into account.

3°) *To exercise any ecclesiastical offices, ministries, functions or acts of governance.* Ecclesiastical office is to be understood in the sense of c. 145. *Ministries* refers to ministries of the ordained and other ministries for which lay people may be designated (the word "ministries" did not appear in the first drafts of the canon; it was introduced, precisely "propter nova ministeria laicis collata"[15]). *Function* means any activity with a spiritual purpose and a public dimension that is not a permanent institution. An *act of governance* is any act put in place under the power of governance in the internal and external fora, through legislative, executive or judicial powers (cf. c. 135).[16]

b) For a declared *ferendae* or *latae sententiae* excommunication (§ 2), the effects are substantially increased.

1°) If the excommunicate attempts to participate actively in celebrating the Holy Eucharist or any other ceremony of public worship, he or she must be removed or the liturgical celebration interrupted, unless there is a grave reason to the contrary. Logically, avoidance of harm to the reputation of the excommunicate cannot be considered grave cause in this case.

2°) Any acts of governance performed are invalid. Assistance at marriage is not properly speaking an act of jurisdiction, but according to c. 1109, would also be invalid.

3°) It is prohibited to make use of any privileges previously obtained, even if they are not lost.

4°) No dignity, office or other function in the Church may be validly obtained.

5°) The right to receive the fruits of a dignity, office, function or pension held in the Church is lost. However, care must be taken that the offender does not lack the necessary means for proper support. This is expressly stated in c. 1350 § 1 with reference to the clergy, although

14. Cf. *Relatio complectens syntesim animadversionum ad Em.mis atque Exc.mis Patribus Commissionis ad novissimum Schema Codicis Iuris Canonici exhibitarum, cum responsionibus a Secretaria et Consultoribus datis* (Typis Polyglottis Vaticanis 1981), p. 295; *Schema Documenti...*, cit., c. 16, p. 19; *Comm.* 9 (1977), pp. 149 and 151, 80 and 213, 321.

15. Cf. *Comm.* 9 (1977), pp. 149–150.

16. Cf. V. DE PAOLIS, *De sanctionibus...*, cit., p. 74.

similar criteria should be observed for any member of the faithful who might be in similar circumstances. However, this is not a right that directly rises from the dignity, office, etc. In any case, provision for the necessary means of proper support is why the expression "ecclesiastical pension" ("nequit valide consequ i… pensionem ecclesiasticam"), theoretically present in the preceding number (4°),[17] was eliminated.

5. In the light of these effects, doctrine has always considered excommunication as the gravest single penalty in Church law. That is also why c. 1318 establishes that it should not be imposed "except with the greatest moderation, and only for the more grave offenses."

17. Cf. *Comm.* 9 (1977), pp. 148 and 150.

1332 **Interdictus tenetur vetitis, de quibus in can. 1331 § 1 nn. 1 et 2; quod si interdictum irrogatum vel declaratum sit, praescriptum can. 1331 § 2, n. 1 servandum est.**

One who is under interdict is obliged by the prohibition of can. 1331 § 1 nn. 1 and 2; if the interdict was imposed or declared, the provision of can. 1331 § 2 n. 1 is to be observed.

SOURCES: cc. 2255, 2256, 2268–2277

CROSS REFERENCES: cc. 1109, 1331, 1335, 1352

COMMENTARY

José Bernal

1. It is unknown exactly when interdicts came into effect and were applied as a specifically distinct penalty. Prior to the eleventh century, canon law texts may be found where the term *interdictum* is used with the meaning of prohibition, but without designating a specific penalty.

In about the eleventh century, expressions appear such as "prohibit ecclesiastical ministry," "prohibit the divine offices," "to prohibit" (*interdicere*), etc. It was at the beginning of the twelfth century that *interdictum* began to be used to refer to a specific penalty distinct from excommunication. It was received as such into the Decretals.

Traces of personal interdict as a prohibition against attending divine offices or entering a church can be found in the early centuries of the Church. The penalty is frequently called by the term "partial excommunication" and became fully formed during the twelfth and thirteenth centuries.

There is a great controversy among the various authors over when local interdict appeared.[1] Some date it in the fourth century, others in the sixth century and still others in the tenth and eleventh centuries. What is known is that, between the sixth and eleventh centuries, under the influence of Germanic law, which tends to general penalties, its use increased greatly. In the twelfth and thirteenth centuries, it was frequently inflicted, especially on kings and princes rebelling against the Church or to punish popular offenses against the Church or civil society that could not be ade-

1. Cf. F. ROBERTI, *De delictis et poenis* (Rome 1938), pp. 416–417; G. MICHIELS, *De delictis et poenis*, vol. III (Paris-Tornai-Rome 1961), pp. 279–280.

quately repressed with singular or particular penalties. For example, Innocent III[2] imposed a local interdict on the Kingdom of Navarre. In the *Corpus Iuris Canonici*, five grave offenses were punished with the penalty of a general local interdict (an offense against the city, excluding Rome, where an act of aggression was perpetrated against a cardinal; an offense against the provinces whose authorities prohibited the apostolic legates from fulfilling their offices, etc.).[3] In the fourteenth and fifteenth centuries, recourse to local interdict decreased due in a certain degree to the relaxing of discipline among the Christian people. In the Constitution *Apostolicae sedis* (1869),[4] Pius IX no longer mentions local interdict. St. Pius X[5] restored the penalty.

In contrast to the preceding centuries, starting in the eleventh century, when an *interdictum* was imposed, it was always expressly indicated what things were prohibited and what things were not prohibited. Gradually the rigor of the penalty was decreased; exceptions in complying with it due to an important liturgical feast, at times of grave danger, on days when baptisms or confirmations were to be performed, etc. were introduced.

2. In *CIC*/1917, an interdict could be personal or local, and each in turn, general or particular (cf. cc. 2268ff., 2291). In addition, the penalty could be either medicinal (censure: c. 2268 *CIC*/1917) or vindictive (c. 2291). The Code now designates interdict as a medicinal penalty; this implies that it can only be personal,[6] as is also true of all penalties today. Since it is a medicinal penalty, it cannot be imposed in perpetuity or for an indefinite or definite period of time, nor be left to the decision of the superior. When an offender ceases in his obstinacy, he must be absolved.

In both *CIC*/1917 and the present-day Code, interdict has an uncertain meaning, with no specific characteristics.[7] It appears to be defined negatively, being neither excommunication nor suspension. In form, it is analogous to the previous "minor excommunication," so called because it does not directly affect *communio*, but has only some of the effects of excommunication—those expressly indicated.[8]

2. *PL* 214, 80.
3. Cf. G. MICHIELS, *De delictis et poenis*, vol. III (Paris-Tornai-Rome 1961), p. 282.
4. ASS 5 (1869), pp. 305ff.
5. Cf. *AAS* 1 (1909), pp. 765–766; 5 (1913), pp. 517–518.
6. Cf. *Schema Documenti quo disciplina sanctionum seu poenarum in Ecclesia latina denuo ordinatur* (Typis Polyglottis Vaticanis 1973), p. 8; *Comm.* 16 (1984), p. 42.
7. Cf. V. DE PAOLIS, *De sanctionibus in Ecclesia. Adnotationes in Codicem: Liber VI* (Rome 1986), p. 75; A. CALABRESE, *Diritto penale canonico* (Milan 1990), pp. 116–117. Perhaps for this reason some Council Fathers requested its suppression: cf. *Comm.* 16 (1984), p. 42.
8. Cf. Á. MARZOA, "Los delitos y las penas canónicas," in *Manual de Derecho Canónico*, 2nd ed. (Pamplona 1991), pp. 747–748.

We may define interdict as "a censure by which the faithful, though remaining in communion with the Church, are barred from the sacred goods enumerated in the following canons" (c. 2268 *CIC*/1917).

In contrast to previous times, the effects of the penalty have been reduced to the more properly spiritual aspects.

3. Interdict shares some of the effects of excommunication, to which this canon expressly refers.

As in the case of excommunication (see commentary on c. 1331), an interdict automatically incurred (*latae sententiae*) but not declared must be differentiated from an interdict that has been imposed *ferendae sententiae* or declared (for these concepts, see commentary on c. 1314; for a more detailed study of their effects, see commentary on c. 1331).

a) For a case of a *latae sententiae* interdict that has not been declared:

— Any ministerial participation in celebrating the Sacrifice of the Eucharist or any other rite of worship is prohibited.

— Celebrating the sacraments and sacramentals and receiving the sacraments are prohibited.

The prohibited acts are illicit but not invalid.

b) If an interdict has been imposed or declared, the prescription in c. 1331 § 2,1° must also be observed; under it, if the offender attempts to participate actively in the Holy Mass or other liturgical rites, he should be removed unless there is a grave reason to the contrary. In addition, he cannot validly assist at a marriage, as established in c. 1109.

1333 **§ 1. Suspensio, quae clericos tantum afficere potest, vetat: (1) vel omnes vel aliquos actus potestatis ordinis; (2) vel omnes vel aliquos actus potestatis regiminis; (3) exercitium vel omnium vel aliquorum iurium vel munerum officio inhaerentium.**

§ 2. In lege vel praecepto statui potest, ut post sententiam condemnatoriam vel declaratoriam actus regiminis suspensus valide ponere nequeat. §3. Vetitum numquam afficit: (1) officia vel regiminis potestatem, quae non sint sub potestate Superioris poenam constituentis; (2) ius habitandi, si quod reus ratione officii habeat; (3) ius administrandi bona, quae ad ipsius suspensi officium forte pertineant, si poena sit latae sententiae. §4. Suspensio vetans fructus, stipendium, pensiones aliave eiusmodi percipere, obligationem secumfert restituendi quidquid illegitime, quamvis bona fide, perceptum sit.

§ 1. Suspension, which can affect only clerics, prohibits:
- 1° all or some of the acts of the power of order;
- 2° all or some of the acts of the power of governance;
- 3° the exercise of all or some of the rights or functions attaching to an office.

§ 2. In a law or a precept it may be prescribed that, after a judgement which imposes or declares the penalty, a suspended person cannot validly perform acts of the power of governance.

§ 3. The prohibition never affects:
- 1° any offices or power of governance which are not within the control of the Superior who establishes the penalty;
- 2° a right of residence which the offender may have by virtue of office;
- 3° the right to administer goods which may belong to an office held by a person suspended, if the penalty is *latae sententiae.*

§ 4. A suspension prohibiting the receipt of benefits, stipends, pensions or other such things, carries with it the obligation of restitution of whatever has been unlawfully received, even though this was in good faith.

SOURCES: § 1: cc. 2255, 2256, 2278–2285
§ 2: c. 2284
§ 3: cc. 2279, 2280 § 1, 2282
§ 4: c. 2280 § 2

CROSS REFERENCES:

1334 **§ 1. Suspensionis ambitus, intra limites canone praecedenti statutos, aut ipsa lege vel praecepto definitur, aut sententia vel decreto quo poena irrogatur.**

§ 2. Lex, non autem praeceptum, potest latae sententiae suspensionem, nulla addita determinatione vel limitatione, constituere; eiusmodi autem poena omnes effectus habet, qui in can. 1333 § 1 recensentur.

§ 1. The extent of a suspension, within the limits laid down in the preceding canon, is defined either by the law or precept, or by the judgement or decree whereby the penalty is imposed.

§ 2. A law, but not a precept, can establish a *latae sententiae* suspension without an added determination or limitation; such a penalty has all the effects enumerated in can. 1333 § 1.

SOURCES: § 1: c. 2778 § 2
§ 2: cc. 2281, 2282

CROSS REFERENCES: cc. 129–144, 266 § 1, 1009 § 1, 1109, 1335, 1352

COMMENTARY

José Bernal

1. *Historical background*

Prior to the sixth century, a number of ecclesiastical documents using various terms make reference to a penalty by which some priests or deacons were prohibited from exercising their ministry. In that period, suspension was generally imposed as a vindictive penalty. It was understood to be a total suspension from the office and acts of the power of orders. However, some partial suspensions begin to appear.

By the sixth century suspension became more defined, although it was not always distinguished from partial excommunication and interdict against entering a church. Partial suspensions were more frequent. Suspension as censure until the offender is corrected began to be used, both *ferendae* and *latae sententiae*, and even as an administrative measure to repair scandal during the investigation of a suspected offense by a cleric.

In the thirteenth century this penalty underwent an important development. The use of other terms was abandoned, and only the words "suspension" or "to suspend" were now used. In 1214[1] Innocent III declared

1. *X* V, 40, 20.

that suspension should be considered a censure and generally should be applied as such. A clear distinction was made between suspension of order, of office or of benefice, and total suspension that included the three. In turn, from each of those, other suspensions could be derived that had a more reduced scope and were more specific (suspension of the power to consecrate bishops, the use of the pallium, etc.).

The Council of Trent did not change the nature of suspension in any way. It confirmed many existing suspensions and added other new ones. Pius IX, in the Constitution *Apostolicae Sedis* (a. 1869),[2] confirmed all suspensions established by the Council of Trent and added seven other *latae sententiae* reserved to the Roman Pontiff (for example, suspension of conferring order for one year by those who ordained a foreign subject without the dimissorials, etc.). Later, Pius IX[3] and Leo XIII[4] established new suspensions.

CIC/1917 included many of the penalties still effective at the time and added others (for example, the penalties in cc. 2341, 2371, 2386, etc.).

2. *Nature of the penalty of suspension*

Suspension is a censure that can affect only clerics and by means of which they are forbidden fully or partially to exercise the power of order, the power of governance or of office (c. 1333 § 1), or of all of those simultaneously (c. 1334 § 2), and in some cases, the right to receive any goods with economic value.

In contrast to *CIC*/1917, which recognized the penalty as being both vindictive (c. 2298) and medicinal (cc. 2278ff) in nature, today suspension may be imposed only as censure.

This is a *peculiar* penalty; it can affect only clerics, that is, those who have received the sacrament of order in any of its degrees: diaconate, presbyterate or episcopate (cf. c. 1009 § 1), since clerical condition is acquired starting with receiving ordination to the diaconate (cf. c. 266 § 1).

Today, however, one must consider of the possibility that this penalty could also be imposed upon laypersons[5] who have legal capacity to fulfill certain offices (such as a judge, for example) and who may be permanently instituted to perform some ministries (acolyte, lector, etc.). In this regard, during the reform process some consultors asked that the penalty of suspension also affect the laity: "hodiernas conditiones

2. *ASS* 5 (1869), pp. 305ff.
3. P. GASPARRI-I. SEREDI, *Codicis iuris canonici fontes*, vol. III, no. 565.
4. Ibid., no. 627.
5. Cf. F. AZNAR, commentary on c. 1333, in *Salamanca Com;* A. CALABRESE, *Diritto penale canonico* (Milan 1990), pp. 119–120.

attendentes, in quibus etiam laici ad plura officia deputantur, quae antea solis clericis reservabantur."[6] They may also serve as extraordinary ministers of communion, baptism, preaching and even assist at marriages as a qualified witness. It does not appear that a suspension imposed upon a layperson would have impaired the nature of the penalty. In any case, current discipline strictly establishes that it "can affect only clerics."

In addition, suspension does not affect the condition of communion. Its effects, in contrast to excommunication, are separable. In a certain sense, it is a kind of "minor excommunication," as is interdict, for its effects, as expressly indicated in this norm, are also a part of the effects of excommunication, but in this case concerning the clerical status of the offender. Therefore, the effects of this penalty are not a consequence of the loss of *communio*, as in the case of excommunication, but occur directly.[7]

3. *Types of suspension and effects*

If we look at the content of the prohibitions, at the effects of the penalty, we may distinguish four types of suspension:

1°) Total or partial suspension *of order*, depending upon whether it prohibits exercising some or all acts of the power of order. Therefore, it does not affect acts included in the power of governance, although to obtain the power of governance the law requires having received sacred orders.

2°) Total or partial suspension *of jurisdiction*, depending upon whether it prohibits some or all acts of exercising the power of jurisdiction. These are the acts delimited by cc. 129–144. They are acts proper to legislative, executive and judicial power (cf. c. 135).

3°) Total or partial suspension *of office*, depending upon whether it prohibits some or all the rights or functions inherent in an office (cf. c. 145).

4°) *Total* suspension, which includes suspension of order, jurisdiction and office. This penalty, especially grave because it includes all the previous effects, is covered, along with criteria that restrict its use, in c. 1334 § 2.

When due to suspension a cleric is prohibited from receiving benefits, stipends, pensions or other remuneration, if he does receive it illegitimately, even in good faith, he is obligated to return it (cf. c. 1333 § 4).

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6. Cf. *Comm.* 9 (1977), p. 153.
7. Cf. Á. MARZOA, "Los delitos y las penas canónicas," in *Manual de Derecho Canónico*, 2nd ed. (Pamplona 1991), p. 748.

4. *Suspension "latae" and "ferendae sententiae"*

As with other censures (see commentary on cc. 1331 and 1332), when studying the effects of the penalty of suspension we must also distinguish between *latae sententiae* suspensions that are not declared, or *ferendae sententiae* or *latae sententiae* suspensions that are declared.

With regard to content, suspension can be partial or total, depending upon whether it is determined by *a*) law, for *latae* and *ferendae sententiae* penalties; *b*) precept, only for *ferendae sententiae* penalties; or *c*) sentence or decree, for *ferendae sententiae* penalties.

The fundamental difference is that, in *latae sententiae* penalties that are not declared, acts contrary to prohibitions are always illicit, but in *ferendae sententiae* and *latae sententiae* penalties that are declared, the law or precept that creates the sanction may establish that it is invalid for acts of governance (cf. c. 1333 § 2).

Suspension from office by sentence or after a declaration always means the invalidity of assisting at marriage, by the express determination of c. 1109.

5. *Determining the efficacy of the penalty of suspension*

a) *Negative determinations*

To determine the scope and effects of suspension, c. 1333 establishes a series of negative limitations that indicate the aspects or acts that suspension cannot affect. Specifically, c. 1333 § 3 says that prohibitions involving suspension never affect the following:

1°) *Any offices or power of governance which are not within the control of the Superior who establishes the penalty.* This is logical, since no one can take away from another anything over which he has no power. Thus, for example, the diocesan bishop cannot suspend an army chaplain from office or a religious from a governmental function he may have in the community. Nonetheless, the bishop may suspend them from any diocesan offices that they might exercise (for example, the office of parish priest).

2°) *A right of residence which the offender may have by virtue of office.*

3°) *The right to administer goods which may belong to an office held by the person suspended, if the penalty is latae senteciae.*

b) *Positive determination*

In c. 1334, a series of positive determinations is given to delimit the scope of the suspension penalty. Specifically § 1 provides that, within the limits established in c. 1333, the scope of suspension will be determined

by the law or precept itself, or the sentence or decree that imposes the penalty.

Therefore, the specific effects of the penalty may be delimited *a*) at the time it is constituted: by the law or precept that orders suspension, whether *latae* or *ferendae sententiae*; or *b*) at the time the penalty is imposed, in the case of a suspension *ferendae sententiae* that is not delimited: either in the sentence itself (when imposed judicially) or by decree (when it is imposed administratively).

In addition, § 2 of c. 1334 establishes an exception, that only the law (both particular and universal), but not the precept, may establish a *latae sententiae* suspension without adding any determination or limitation (*total* suspension), because such a penalty produces all the effects listed in c. 1333 § 1; in other words, prohibition of all acts of the power of order, the power of governance and the rights or functions inherent to an office, all of which gives it special gravity. Consequently, when suspension is established *ferendae sententiae*, only a precept may determine *total* suspension.

1335 **Si censura vetet celebrare sacramenta vel sacramentalia vel ponere actum regiminis, vetitum suspenditur, quoties id necessarium sit ad consulendum fidelibus in mortis periculo constitutis; quod si censura latae sententiae non sit declarata, vetitum praeterea suspenditur, quoties fidelis petit sacramentum vel sacramentale vel actum regiminis; id autem petere ex qualibet iusta causa licet.**

If a censure prohibits the celebration of the sacraments or sacramentals or the performance of an act of governance, the prohibition is suspended whenever this is necessary to provide for the faithful who are in danger of death. If a *latae sententiae* censure has not been declared, the prohibition is also suspended whenever one of the faithful requests a sacrament or sacramental or an act of the power of governance; for any just reason it is lawful to make such a request.

SOURCES: cc. 2261 §§ 2 et 3, 2275,2°, 2284

CROSS REFERENCES: cc. 1331–1334, 1352, 1752

COMMENTARY

José Bernal

1. This canon closes the chapter on censures. In the light of its effects (cf. cc. 1331–1334), it is easy to imagine specific pastoral situations that canon law cannot obviate, and which give rise to the general exceptions in this canon: *a*) since the *suprema lex* of *salus animarum* in the inspiring principle (cf. c. 1752), attention to the faithful cannot be ignored if they are in danger of death and needful of the sacraments and sacramentals or some act of governance; *b*) if the censure has not been declared, by virtue of the same principle (and possibly also considering, although not necessarily, that the censured person has no obligation to dishonor himself and should avoid scandal) priority over observing the penalty is given to the reasonable request of the faithful for a sacrament, sacramental or some act of governance.

The norm in this canon attempts to anticipate the possibility of these situations:

a) establishing suspension of the prohibition against celebrating the sacraments or sacramentals or performing acts of governance derived from any type of censure insofar as necessary to attend to the faithful in danger of death;

b) establishing the same suspension, but only in the case of undeclared *latae sententiae* censures, for a reasonable request (*qualibet iusta causa*) from a member of the faithful who is not in danger of death.

The basic principles of the canon were already present in *CIC*/1917, although scattered in several canons: cc. 2232 § 1, 2261 §§ 2–3, 2275 § 2, 2284. A propos of the "just reason" in the second case, the best interpretation is a transcription of the former c. 2261 § 2, which, although it concerns only excommunication,[1] in spirit is applicable to this norm: "the faithful ... for any just cause whatsoever can request Sacraments or Sacramentals from an excommunicate, especially if there are no other ministers available, and in that case the excommunicate so requested can administer them, without having any obligation of asking whom the cause of the petition concerns."

2. However, in the two cases being considered, the prohibitions resulting from the censure are only *suspended*, the penalty is not remitted, and only insofar as necessary (danger of death) or requested (for any just reason) to celebrate the sacraments or sacramentals or perform acts of governance. Nevertheless, with respect to the norms of *CIC*/1917, which established certain restrictions if other ministers were present (cf. c. 2261 §§ 2–3 *CIC*/1917), the possible presence of other ministers is not mentioned as a restriction.

3. For an overall picture of the exceptions to the censure system, we should also consider c. 1352 (see commentary), which concerns the passive aspect of the problem and establishes that "if a penalty prohibits the reception of the sacraments or sacramentals, the prohibition is suspended for as long as the offender is in danger of death."

1. But they refer to cc. 2275 (interdict) and 2284 (suspension).

CAPUT II
De poenis expiatoriis

CHAPTER II
Expiatory Penalties

1336 **§ 1. Poenae expiatoriae, quae delinquentem afficere possunt aut in perpetuum aut in tempus praefinitum aut in tempus indeterminatum, praeter alias, quas forte lex constituerit, hae sunt:**

1° prohibitio vel praescriptio commorandi in certo loco vel territorio;

2° privatio potestatis, officii, muneris, iuris, privilegii, facultatis, gratiae, tituli, insignis, etiam mere honorifici;

3° prohibitio ea exercendi, quae sub n. 2 recensentur, vel prohibitio ea in certo loco vel extra certum locum exercendi; quae prohibiti-ones numquam sunt sub poena nullitatis;

4° translatio poenalis ad aliud officium;

5° dimissio e statu clericali.

§ 2. Latae sententiae eae tantum poenae expiatoriae esse possunt, quae in § 1, n. 3 recensentur.

§ 1. Expiatory penalties can affect the offender either forever or for a determined or an indeterminate period. Apart from others which the law may perhaps establish, these penalties are as follows:

1° a prohibition against residence, or an order to reside, in a certain place or territory;

2° deprivation of power, office, function, right, privilege, faculty, favour, title or insignia, even of a merely honorary nature;

3° a prohibition on the exercise of those things enumerated in n. 2, or a prohibition on their exercise inside or outside a certain place; such a prohibition is never under pain of nullity;

4° a penal transfer to another office;

5° dismissal from the clerical state.

§ 2. Only those expiatory penalties may be *latae sententiae* which are enumerated in § 1 n. 3.

SOURCES: § 1: cc. 2286–2305

CROSS REFERENCES: cc. 1314, 1315, 1321, 1337–1338

COMMENTARY

Giuseppe Di Mattia, ofm. conv.

I. While c. 1312 lists the types of "sanctiones poenales in Ecclesia," for logical organizational reasons the description and specific treatment of expiatory penalties is covered in cc. 1336–1338. But before embarking upon a commentary on each of those canons, it seems wise to make some general statements in order to frame them in the structure of the current penal system.

The first thing noticed both by these scholars and those who apply the law alike is the change in terminology (see commentary on c. 1312 § 1). There is no longer talk of vindictive penalties (c. 2216 *CIC*/1917), but of *expiatory* penalties, as opposed to *medicinal* penalties or *censures*, respecting the classical canonical dichotomy, and naturally also of *penal remedies* and *penances*.

The term is taken from St. Augustine, although he did not use it with the meaning that is attributed to it here, in the are? of penal law.[1]

The change in terminology is due to the intention to eliminate any erroneous conception of pejorative meaning, exclusively of punishment and repression, that is, a penalty inflicted *in vindictam rei*, ignoring the amendment of the offender. This conception is due to the fact that the term has lost its original meaning in Roman law, that is, the meaning of reaffirmation of the law.

Retaining the sense of expiation of the penalty given for illegitimate behavior, the new term better emphasizes the basic purpose of the canonical system, which is the repentance of the offenders and the salvation of their souls.

Additionally, in contrast to the intentional ambiguity or lack of precision of the earlier term, strictly speaking that purpose was already present in the preceding Code. This can be clearly seen in the definition in c. 2286, which states that vindictive penalties look *directe* to expiation of the offense, but always directed *ad delinquentis correctionem*, stated by c. 2215 in giving a definition of the canonical penalty. It is absolutely necessary to read the two canons (2215 and 2286 *CIC*/1917) together to

1. *De civitate Dei*, 21: *PL* 41, 7, 727.

understand this point. In any case, c. 2215 *CIC*/1917 should be considered to be the compass in navigating the tempestuous and sensitive area of canonical penal law.

This purpose is also evident both in the change of terminology and expressly in § 2 of c. 1312. There it is required of the particular legislator (cf. c. 135 § 2), when establishing other expiatory penalties different from the universal expiatory penalties, that they be "consistent with the Church's supernatural purpose." That purpose is solemnly formulated in the *in fine* of c. 1752.

In sum, the accent of the pastoral spirit reverberates insofar as "the penalty threatened by the authority is to be considered as an *instrument of communion*,"[2] as John Paul II said, and the important content of cc. 2215 and 2286 from the superseded Code is clearly echoed in the present-day norms.

It is especially worth noting the enormous simplification achieved by eliminating the distinction between expiatory penalties (previously vindictive) common to all faithful and expiatory penalties that are exclusive to the clergy, and the drastic reduction in their number. There are only five penalties listed in c. 1336, while the previous Code listed twelve common penalties and twelve exclusively for the clergy (cc. 2291, 2298 *CIC*/1917).

The simplification of penalties went to the heart of the matter, abrogating methods inadequate for the mentality and culture of our time. In particular, some have disappeared that were not completely consistent with human dignity and the principles of sacramental theology and ecclesiology. Among the most significant that have disappeared there are local and general interdict, transfer or elimination of the episcopal see or parish, deprivation of sacramentals, deprivation of ecclesiastical dress, deposition, degradation and suspension in perpetuity.

This extensive and thorough innovation inspires admiration for the legislator's wisdom and pastoral openness. Enlivening it with nourishment drawn from the Council, the legislator was able to turn penal law into something extremely "human," exquisitely respecting human dignity and human rights, for all that it has meant in changing behavior that is harmful to the good and order of the community.

The whole process was duly prepared by the document of the first Synod of Bishops, *Principles Governing the Revision of the Code of Canon Law*, of September 30, 1967, in the general and specific directives for penal law (nos. 9–10); by the ample clarification of the *Praenotanda*; by the excellent presentation of the norms in the *Schema Documenti quo*

2. *AAS* 71 (1979), p. 425.

disciplina sanctionum seu poenarum in Ecclesia latina denuo ordinatur of 1973; and finally, by the in-depth debate held on the revision of the *Schema.*[3]

While we are making these generalizations, it seems a good time to include a new observation of interest with regard to the effective possibility of applying expiatory penalties to the social-ecclesial structure of the canonical system. The problem affects the entire penal area, although for our present considerations it takes on rather debatable aspects and situations.

Examining the list of expiatory penalties in c. 1336, we see that they are addressed almost exclusively to the clergy, with an exception in § 1,2° and 3° (removal of a layperson from the office of judge, prohibition of a layperson from exercising a ministry in which he was instituted, or withdrawing the mandate to teach in a pontifical or diocesan higher institute or teaching religion in a Catholic school). Insofar as members of Christ's faithful are also citizens (their condition as "subditi legum et canonum' must inevitably be combined), it is not possible to affect them with a certain type of penalty, such as limiting their freedom of movement by penalties of confinement or exile, or penal transfer of office. However, the increased and intense participation of laypersons in ecclesial life and in its institutions could more frequently result in need for penal acts against them by ecclesiastical authority.

II. The introductory clarification of c. 1336 § 1 that is placed there as a premise for the subsequent list of five expiatory penalties determines the criteria for inflicting and performing them. It also warns that the list is not exhaustive. It states that the penalties may be perpetual, for a determinate or indeterminate period of time. The supreme legislator and the legislator *infra auctoritatem supremam* (cf. c. 135 § 2) may establish different penalties in other laws.

Both statements are consistent with the general principles of penal law, to which c. 1312 explicitly refers and c. 1315, implicitly. The substantial difference from medicinal penalties is also pointed out; their cessation is obligatorily linked to the offender's *recessio a contumacia*, as provided in cc. 1347 and 1358. Cessation of expiatory penalties is not directly liked to the offender's repentance, but rather depends on a number of factors, among which the behavior of the interested party plays a relevant role, and these factors must be evaluated by the superior, to whom cc. 1354 attributes broad powers.

III. After those explanations, let us consider the five numbers in which § 1 of this canon lists the expiatory penalties.

1°) *Prohibition against or mandate to reside in a determined territory.* Both parts of this double configuration literally reproduce the text of c. 2298,7°–8° *CIC*/1917, where these penalties were reserved to the clergy.

3. Cf. *Comm.* 1 (1979), pp. 77–85; 9 (1977), pp. 155–158.

Now, at least in theory, they include others of Christ's faithful. Although the penalty is reminiscent of exile and imprisonment, which were in effect in the former law and frequently used in confrontations between clergy and religious, it is still found today in civil penal law. Its inclusion in canonical penal law is justified from that point of view.

The *ratio* that underlies this penalty is more than clear: to remove the offender from the place of the offense so as to limit or mitigate scandal and remedy the harm caused to persons and/or things, while at the same time facilitating the amendment of the subject upon whom it is inflicted.

In practice, however, there are difficulties that were already highlighted in the debate on the revision of the 1973 *Schema*. The problem is that there may be repercussions in the civil institutional structure. In that sense it may not be imposed upon laypersons, and also, logically, not upon the permanent deacon, especially if he has a family. Therefore, it may be clearly deduced from a comparison with the parallel norm in *CIC*/1917 and from all the details in c. 1337 (see commentary) that the *mens legislatoris* was to reserve this penalty for the clergy and religious.

2°) *Deprivation*. Nine types of penalties clearly distinct from one another are here described. They go from the gravest (deprivation of power) to the lightest, that might even be considered irrelevant (deprivation of insignia even though merely honorary). With regard to the meaning and penal content of each deprivation, we must look at the specific norms and doctrine, and always look at the principles of strict interpretation of the penal norms and of the law most favorable to the offender (cf. cc. 18 and 1313).

The procedural provisions established to inflict penalties judicially and administratively must be observed in applying the penalties that deprive of the goods indicated.

It should be noted that the number we are considering (§ 1,2°) regroups the deprivations that were in cc. 2291,7°–10° and 2298,4°–6° into a single provision.

Since this is a question of deprivation, it is fundamental to keep in mind that behavior that destroys compliance with these penalties is always illicit and has repercussions for the validity of the acts if they are performed when exercising power or office, whether ministerial or jurisdictional: the acts will be null and void.

3°) *Prohibitions*. The first thing to emphasize about the content of no. 3° is the radical difference with the previous number. There, it was a question of deprivation; here, it concerns *prohibition* against exercising or enjoying any of the nine goods described.

This is a different penalty. In the case of deprivation, the offenders, to use that term, are "paralyzed" in their acts and in any place where they might perform them, but in the case of prohibition, the legislator includes

two possibilities: *a*) absolute prohibition from exercising the acts named in no. 2°; and *b*) the prohibition against performing them in or outside of a specific place. Any failure to comply with this penalty is always illicit, so that, as the legislator expressly states, "such prohibition is never under pain of nullity." This assumes that a superior cannot threaten the penalties with the clause that nullifies contrary acts. The very nature of the juridical concept of prohibition seems to require it; such a grave effect would be inconsistent with a penal act commonly deemed to be light.

4°) *Penal transfer to another office.* Because it is clear, this number does not need any special commentary. The term *penal* that modifies and justifies transfer is sufficiently expressive. It implies that the subject punished with this penalty shall not be given any higher office, or one of greater prestige or responsibility. This observation is appropriate because, after being cleverly debated, the specification *ad inferius* was eliminated, in c. 2298,3° of *CIC*/1917 and which was still included in c. 21 § 1 of the 1973 *Schema.*

5°) *Dismissal from the clerical state.* The fifth and last of the list of expiatory penalties gives us the maximum penalty of this type. Here we must note the fortunate disappearance of the penalties of deposition and degradation of the clergy in c. 2948,10° and 12° (cf. cc. 2303–2305 for their application) from the Pio-Benedictine Code. The penalty, burdensome in itself, suggested repulsive and vilifying connotations with regard to human dignity, regardless of how grave an offense, especially when *actual* degradation was inflicted in observance of the "solemnia praescripta in Pontificali Romano" (c. 2305 § 3).

The extreme gravity of the penalty has led the legislator to caution against applying it rigidly; it should be used only as an *ultima ratio*, after exhausting all other measures, including penal measures, that could lead to the moral and social rehabilitation of the offender. The penalty, therefore, cannot be established by a particular law (c. 1317); it must be expressly provided in the universal law that describes the offense (for example, c. 1364 § 2: apostasy, heresy and schism; c. 1367: profanation of the sacred species; c. 1370 § 1: the use of physical force against the Roman Pontiff, etc). Since the penalty is perpetual, it cannot be imposed by administrative decree (c. 1342 § 2), but must always and exclusively be by juridical process with a tribunal of three judges, or even, in more difficult cases, five judges (c. 1425 §§ 1,2° and 2).

With expulsion, the rights and duties inherent in the clerical state cease *ipso iure*, but not so the obligation of celibacy, dispensation from which "is granted solely by the Roman Pontiff" (cc. 292 and 291).

After the penalty is imposed, when it is put into practice, the expelled cleric is not "abandoned to his fate," but remains within the maternal heart of the Church, and "if a person is truly in need because he has been dismissed from the clerical state, the ordinary is to provide in the best way possible" (c. 1350 § 2).

The way this penalty is stated shows a sensitive respect for fundamental human rights and human dignity, even for an offender. The point of reference for this renewed norm is given by the legislator when the harshness of the title of this subject in *CIC*/1917 was eliminated ("Reducing clerics to the lay state," cc. 211–214) and in the new Code substitutes a new one more in step with the times: "Loss of the clerical state" (cc. 290–293).

IV. Paragraph 2 of this canon makes a statement that reflects rigorous fidelity to the directive principles of the *Document* 1967, no. 9, expressed as a general principle in no. 5 of the 1973 *Schema* and confirmed in subsequent revisions until finally sanctioned in the current c. 1314. Thus, only the prohibitions provided in no. 3° of § 1 can be established as *latae sententiae* penalties; all other expiatory penalties, including the other ones in § 1 and any others that might possibly be established by the lower legislator, must be established exclusively as *ferendae sententiae* penalties.

1337 **§ 1. Prohibitio commorandi in certo loco vel territorio sive clericos sive religiosos afficere potest; praescriptio autem commorandi, clericos saeculares et, intra limites constitutionum, religiosos.**

§ 2. Ut praescriptio commorandi in certo loco vel territorio irrogetur, accedat oportet consensus Ordinarii illius loci, nisi agatur de domo extradioecesanis quoque clericis paenitentibus vel emendandis destinata.

§ 1. A prohibition against residing in a certain place or territory can affect both clerics and religious. An order to reside in a certain place can affect secular clerics and, within the limits of their constitutions, religious.

§ 2. An order imposing residence in a certain place or territory must have the consent of the Ordinary of that place, unless there is question of a house set up for penance or rehabilitation of clerics, including extra-diocesans.

SOURCES: § 1: cc. 619, 2302; *CD* 35; *ES* I, 25; *MR* 44
§ 2: c. 2301

CROSS REFERENCES: cc. 134 § 2, 1336

COMMENTARY

Giuseppe Di Mattia, ofm. conv.

The norms established in this canon have the determinative function of § 1,1° in the preceding canon. They specify the possible subjects of an expiatory penalty that orders or prohibits residence in a certain place and they emphasize the personal and territorial jurisdictional relationship between the possible subjects. Those subjects are clerics and religious, and their respective ordinaries. The canon also establishes the methods for applying the penalty.

1. Both possibilities, prohibitions and orders to reside in a certain place or territory, are laid out in § 1 from the perspective of personal jurisdiction.

For prohibitions, the local ordinary may take action against clerics, even if they are not his subjects, and against religious, but their superior

must issue the necessary orders before an action can be executed. The rationale of this provision is clearly well-founded.

For mandates, the local ordinary may act directly with regard to clerics, who are his subjects, and indirectly with regard to religious "within the limits of their constitutions." In this case too, the limiting clause is supported by an evident rationale, since double jurisdiction, internal and external to the religious institution, comes into play.

2. The content of § 2 gives a necessary new clarification of the issue and establishes the principle of territorial jurisdiction.

Thus the penalty of residing in a certain territory or place, outside the diocesan territory of the ordinary who inflicts it, is subordinate to consent by the local ordinary or territory chosen to be adequate to amend the offender and consistent with the retributive quality of an expiatory penalty.

The rationale behind the norm is more than well-founded, since the possible effect of the presence of an offender in that place or territory must be taken in to consideration.

Finally, the condition established for a penal measure to be effective, the consent of the ordinary *ad quem*, ceases when the imposed residence is an interdiocesan house specifically set up for priests who are serving legitimately imposed penalties. The norm specifies that the house must be "established for penance or rehabilitation of clerics, including extra-diocesans."

1338 **§ 1. Privationes et prohibitiones, quae in can. 1336 § 1 nn. 2 et 3 recensentur, numquam afficiunt potestates, officia, munera, iura, privilegia, facultates, gratias, titulos, insignia, quae non sint sub potestate Superioris poenam constituentis.**

§ 2. Potestatis ordinis privatio dari nequit, sed tantum prohibitio eam vel aliquos eius actus exercendi; item dari nequit privatio graduum academicorum. § 3. De prohibitionibus, quae in can. 1336 § 1, n. 3 indicantur, norma servanda est, quae de censuris datur in can. 1335.

§ 1. The deprivations and prohibitions enumerated in can. 1336 § 1 nn. 2 and 3 never affect powers, offices, functions, rights, privileges, faculties, favours, titles or insignia, which are not within the control of the Superior who establishes the penalty.

§ 2. There can be no deprivation of the power of order, but only a prohibition against the exercise of it or of some of its acts; neither can there be a deprivation of academic degrees.

§ 3. The norm laid down for censures in can. 1335 is to be observed in regard to the prohibitions mentioned in can. 1336 § 1 n. 3.

SOURCES: § 1: c. 201 § 1
§ 2: cc. 211 § 1, 2296 § 2
§ 3: cc. 2261 § 2, 2275,2°, 2284

CROSS REFERENCES: cc. 207 § 1, 1008, 1335, 1336

COMMENTARY

Giuseppe Di Mattia, ofm. conv.

At first glance this canon gives the following impression: from the technical and juridical point of view, § 1 seems unnecessary; the other two (§§ 2 and 3), however, highlight two fundamental issues: onetheological and the other an expression of the supreme purpose of canon law.

1. The content of § 1 lies within the basic principles of the general theory of law, which categorically requires a jurisdictional relationship between the author of an act (in this case penal) and the target of the act.

From that point of view, a new detail is given here by the legislator, when he repeats each of the nine goods described in c. 1336 and establishes that deprivation or prohibition of them will be effective only if the person and goods are "within the control of the Superior who establishes

the penalty;" otherwise the act, in addition to being null and void, is juridically non-existent.

As it stands, this provision of the Code requires no further consideration. It is evident from the meaning of the words when precisely used in the juridical area. That is why it has been respectfully suggested that it is unnecessary.

2. In the current system (in comparison with the previous system as seen in c. 2298,12° in relation to c. 2305 § 3 pertaining to the "degradation" of a priest, see III, 5° of the commentary on c. 1336), the norm in § 2 is particularly important and carries incisive force because it emphasizes the theological principle inherent in the indelible character of the sacrament of order. That is why it is juridically correct to say that *deprivation of the power of order* is inconceivable and inadmissible, whereas *prohibition*, either total or partial, *against exercising a sacerdotal ministry* is perfectly possible. The extension of the prohibition will be established by the specific penal provision.

Within the syntactic structure of the same sentence, the legislator adds to the first prescription, which is clearly important, another significant and just prescription: a prohibition against deprivation of academic degrees. Undoubtedly the norm is more than reasonable; an academic title, legitimately acquired, belongs to a person and becomes a right that is a determining factor for that person from a social and cultural perspective, and of which he or she cannot be dispossessed. At most, under certain circumstances, use of the title could be prohibited.

All of which leads to two conclusive reflections on the subject at hand: the first is intrinsic to the norm; the second, seen from a technical point of view.

With respect to the first, the prohibition against the power of order is founded on sacramental theological doctrine; therefore, the prohibition is founded on the fact that a penal act of that type would be completely null and void. As for the prohibition against deprivation of academic degrees, that belongs to positive law; thus a penal act would be null because it is prohibited.

The second thought is prompted by the fact that both prohibitions are formulated as if equal to one another. This connection appears inadequate if we think of the substantial difference in the foundations of the two: theological for order, and merely juridical and positive for academic degrees. This discrepancy was noted during the revision of c. 23 § 2 in the 1973 *Schema*. The observation was not accepted, however, and was answered as follows: "Quae tamen suggestio fundamento carere videtur."[1] It

1. *Comm.* 9 (1977), p. 158.

is not easy to understand that judgment; it was, however, followed, and the positive norm was included as it appears.

3. In § 3 the supreme aim of canon law is emphasized: the *salus animarum* (cf. c. 1752). Motivated by this abiding purpose, the legislator opportunely provides for suspending the prohibitions in c. 1336 § 1,3° when the salvation of the souls of the faithful is at risk. Thus the canon makes express reference to c. 1335, which includes the same provision for censures.

By general reference the paragraph includes the nine goods described in the referenced canon (c. 1336: see commentary). However, an examination of the text of c. 1336 in relation to c. 1335 leads us to deduce that the only prohibition that directly affects the salvation of souls is the first one: deprivation of power. In c. 1335 mention is expressly made of the power of order and the power of jurisdiction. It does not appear that any of the other prohibitions directly affect any important assumption in the salvation of souls.

The legislator's pastoral solicitude includes the requirements of the spiritual and community life of the faithful, and those are not exclusively limited to the extreme situation of danger of death. The prohibition, according to c. 1335 and referenced in c. 1338, is also suspended if a *latae sententiae* censure has not been declared. In that case, and in applying the provision to expiatory penalties, a request for a sacrament or sacramental and/or an act of governance may always be granted provided that there is "any just reason."

This paragraph includes only the *prohibitions* listed in c. 1336 § 1,3°. What if the offender is affected by *deprivation* under § 2 of c. 1336? Is the principle of suspension of the prohibition then applicable? At first sight the most logical answer appears to be no. But if the reason is based on the above-mentioned spirit of canon law, the answer should become positive, since it can adequately be placed within the juridical and pastoral structure of the canonical system. It is obvious that the circumstances indicated in the norm should be verified. The legislator's silence (if it is indeed silence) is supplemented by c. 19 and in light of cc. 976 and 1352 § 1, under which all ecclesiastical laws are "frozen" when an act affects the salvation of the souls of the faithful.

CAPUT III
De remediis poenalibus et paenitentiis

CHAPTER III
Penal Remedies and Penances

1339 **§ 1. Eum, qui versatur in proxima delinquendi occasione, vel in quem, ex investigatione peracta, gravis cadit suspicio delicti commissi, Ordinarius per se vel per alium monere potest.**

§ 2. Eum vero, ex cuius conversatione scandalum vel gravis ordinis perturbatio oriatur, etiam corripere potest, modo peculiaribus personae et facti condicionibus accommodato.

§ 3. De monitione et correptione constare semper debet saltem ex aliquo documento, quod in secreto curiae archivo servetur.

§ 1. When someone is in a proximate occasion of committing an offence or when, after an investigation, there is a serious suspicion that an offence has been committed, the Ordinary either personally or through another can give that person a warning.

§ 2. In the case of behaviour which gives rise to scandal or serious disturbance of public order, the Ordinary can also reprove the person, in a way appropriate to the particular conditions of the person and of what has been done.

§ 3. The fact that there has been a warning or a correction must always be proven, at least from some document to be kept in the secret archive of the curia.

SOURCES: § 1: cc. 2306,1°, 2307, 2309 §§ 1, 2 et 6
§ 2: cc. 2306,2°, 2308, 2309
§ 3: c. 2309 § 5

CROSS REFERENCES: cc. 316 § 1, 697, 1312 § 3, 1328 § 2, 1341, 1342 § 1, 1347 § 1, 1348, 1394 § 1, 1395 § 1, 1396, 1371

COMMENTARY

Josemaría Sanchis

1. Within the general framework of the penal system, *penal remedies* are preventive measures; they are juridical and pastoral instruments whose principal purpose is to prevent offenses (cf. c. 1312 § 3). Primarily, they are used to avoid the commission of an offense. They may, however, also be used to avoid imposing a penalty when the same purpose may be achieved with a penal remedy. Thus ecclesiastical authorities have available not only penalties (to punish offenses actually committed and proved through the penal process), but also penal remedies suitable for handling situations that might be called intermediate, since the offense has not actually been committed (cf. c. 1328 § 2), or the behavior does not in and of itself constitute an offense, or finally, because the presumed delinquent action is not sufficiently certain for the penalty to be applied (cf. c. 1348).

These measures may be used during the period of time between notice of the possible commission of an offense and certainty that it was committed. Thus, penal remedies are not penalties or even punishment, properly speaking, for both necessarily presuppose a certain offense. Rather, they are acts by the ecclesiastical authorities related to behavior that to some degree, or at least apparently, has harmed or may harm the ecclesial juridical system. By their nature and function, penal remedies have a well-defined pastoral purpose, as c. 1341 also highlights when it refers to them among the means that may be used to obtain the purpose of a penalty and thus avoid the penal process.

2. There are two types of penal remedies: warning and correction.

a) *Warning* consists in ordering or inviting someone to amend their behavior. It may be directed specifically to a member of the faithful in any of the following circumstances: *a*) being in a proximate occasion of committing an offense, or *b*) being gravely suspected of having committed an offense. The text adds that suspicion must be based on investigation prior to the penal process, that is, after receiving notice that an offense has possibly been committed, and referred to in c. 1717. It cannot be said, however, that prior investigation is a requirement in this case for a legitimate warning.

In some cases warning is a prerequisite for the valid imposition of a penalty, meaning that it is a condition of punishability. To fulfill their medicinal purpose, censures cannot be validly imposed unless the offender was first admonished to cease in obstinacy (cf. c. 1347 § 1). Similarly, to apply certain graver expiatory penalties, prior warning is established as a requirement (cf. cc. 1394 § 1, 1395 § 1, and 1396). In other cases warning is a constitutive element (cf. c. 1371).

Warning prior to expulsion from an association of the faithful (cf. c. 316 § 2) and expulsion of religious from their institute (cf. c. 697) are juridically similar figures with regard to their disciplinary function.

b) *A correction* is a formal reprimand to someone who has done something wrong. Specifically, someone who by misconduct has caused scandal or a serious disturbance of public order may be corrected. Therefore, the penal remedy of correction is used in situations where the behavior of a member of the faithful, without being an offense because it is not so designated in a penal norm, nevertheless causes harm similar to an offense, although usually less serious. Therefore, in many cases, correction can be an appropriate response to the types of behavior covered in c. 1399.

To be effective, a correction must be just and therefore proportionate to both the circumstances of the event (that determine the degree of seriousness) and the circumstances and condition of the person (age, health, office, etc.).

3. According to the text of the canon, only an ordinary can be *the author* of a penal remedy (cf. c. 134 § 1), although in the case of a correction, it may done personally or through another.

Penal remedies may be applied by decree (cf. c. 1342 § 1). For the various aspects and essential/incidental elements regarding their establishment, notification and execution. The juridical regulations for these administrative acts must be followed. These juridical regulations are mainly found in cc. 35–38.

Penal remedies, because they affect the external forum, should be in writing (cf. c. 37). This differentiates them from other types of verbal warnings, warnings or corrections that are not as formal, such as the fraternal correction mentioned in Mt 18:15 and other possible methods used in pastoral care (cf. cc. 1341 and 1348). In c. 1328 § 2 it seems, however, that it is also acceptable for penal remedies to be applied, at least in some cases, by a judge's decision or court order. In c. 1342 § 1 this possibility is left open.

There should always be a written record of a penal remedy, or it should at least be documented, since upon occasion it will be necessary to prove that it occurred, when it happened or when notice was given. Because of the nature of the content, it will be kept in the secret archive of the curia (c. 489).

1340 **§ 1. Paenitentia, quae imponi potest in foro externo, est aliquod religionis vel pietatis vel caritatis opus peragendum.**

§ 2. Ob transgressionem occultam numquam publica imponatur paenitentia.

§ 3. Paenitentias Ordinarius pro sua prudentia addere potest poenali remedio monitionis vel correptionis.

§ 1. A penance, which can be imposed in the external forum, is the performance of some work of religion or piety or charity.

§ 2. A public penance is never to be imposed for an occult transgression.

§ 3. According to his prudent judgement, the Ordinary may add penances to the penal remedy of warning or correction.

SOURCES: § 1: cc. 2312 § 1, 2313 § 1
§ 2: c. 2312 § 2
§ 3: c. 2313 § 2

CROSS REFERENCES: cc. 1312 § 3, 1324, 1326, 1342 § 1, 1343, 1344, 2°, 1357 § 2, 1358 § 2

COMMENTARY

Josemaría Sanchis

1. *Canonical penance* consists in having to perform some religious, pious or charitable work. Canon 2313 § 1 of *CIC*/1917 listed some examples of penances: saying certain prayers, making a pilgrimage, observing a special fast, giving alms for pious purposes, doing spiritual exercises.

A penance is mostly used instead of a penalty or is added to a penalty (cf. c. 1312 § 3).

A canonical penance, like a penalty, is always caused by the prior commission of an offense, or at least an unconsummated offense (cf. c. 1328).

2. A penance may be imposed as a substitute for a penalty *a*) under any of the attenuating circumstances listed in c. 1324; *b*) if the penalty mandated for an offense is optional and substitution by a penance is considered appropriate (cf. c. 1343); and *c*) even if imposition of a penalty is preceptive or obligatory, when at the time of applying it, the offender has already amended his or her life and the scandal has been repaired, or if the

offender has already been sufficiently punished by civil authorities, or if it is foreseen that it will happen (c. 1344,2°). A penance may be added to a penalty incurred *latae sententiae* if among the circumstances of the offense, there are any of the penalty-aggravating causes established in c. 1326 § 1 (cf. c. 1326 § 2). It is also possible to impose a penance when a censure is remitted (c. 1358 § 2).

3. Under § 3, the ordinary may, according to his prudent judgment, add penances to a warning or correction in cases covered by norms, and only in those cases, if a penal remedy is applied to an offense that has certainly been committed.

4. Differing from sacramental penances, canonical penances, which presuppose an offense, because they are a juridical institution, are normally imposed, although not exclusively, in the external forum by means of a decision or decree. Canon 1342 § 1 merely says that penances may in any case whatsoever be applied by decree. Evidently this does not exclude applying them by decision, as can be deduced from the various norms cited above that speak of canonical penance in relation to the discretional powers of a judge. A penance is applied by a judge or superior's decision or decree respectively, depending upon whether the offense was heard judicially or administratively.

Even though a penance may be imposed in the external forum, § 2 of c. 1340 provides that a penance for a transgression that is and remains hidden cannot be imposed publicly. This provision is a concrete manifestation of the right enjoyed by all persons to retain their reputation, even in the Church (cf. c. 220); it acquires special relevance and application in penal matters.

Canon 1357 considers a special case of remission of the *latae sententiae* censure of excommunication or interdict in the internal sacramental forum. For the cases therein indicated, when a confessor, to whom the law grants the power to remit such penalties in those cases, absolves from a penalty, under c. 1358 § 2 he is obligated to impose an appropriate penance. Consequently this would be a canonical penance imposed in the internal forum without the requirements, characteristics and formalities required in the external forum.

TITULUS V
De poenis applicandis

TITLE V
The Application of Penalties

INTRODUCTION

Velasio De Paolis, cs.

1. *Preliminaries*

a) Application is the second stage in the course a penalty should follow. It is the moment between the constitutive moment reached by law or penal precept (cf. cc. 1314–1315, 1319) and the time the penalty ceases after compliance, dispensation or absolution (cf. cc. 1354–1361). This is the most sensitive moment, because it is when the member of the faithful is personally affected by the penalty. It is precisely the time when the superior or judge who is called upon to apply the penalty must maintain the difficult balance between the good of the member of the faithful and the good of the community, between achieving individual good and community good.

b) Since a penalty may be either *ferendae* or *latae sententiae* (cf. cc. 1314, 1318), application will consist either in the imposition of the penalty, if it is *ferendae sententiae*, or in declaration of the penalty, if *latae sententiae*. Therefore tit. V refers to either method of application. The last three canons of the title (cc. 1351–1353) go beyond simple application of penalties, because they presuppose that a penalty has already been applied. Based on those considerations, the title "The Application of Penalties" does not appear to express the content adequately because the canons of the title transcend simple application.[1]

c) Considering that the Church is extremely hesitant to use penal instruments to promote or restore its own discipline (cf. c. 1317) and

1. Cf. V. DE PAOLIS, "L'applicazione della pena canonica," in *Monitor Ecclesiasticus* 114 (1989), pp. 69–94; idem, *De sanctionibus in Ecclesia* (Rome 1986); A. BORRAS, *Les sanctions dans l'Église* (Paris 1990); A. CALABRESE, *Diritto penale canonico* (Milan 1990); R. SEBOTT, *Das Kirchliche Strafrecht* (Frankfurt am Main 1992).

prefers other non-penal methods wherever possible, as stated in the Council of Trent and cited in c. 2214 of *CIC*/1917, the authority with jurisdiction to apply the penalty must first investigate and then identify (cf. cc. 1717–1718) the foundation of the offense and all the conditions for establishing a penal procedure (cf. c. 1718 § 1).[2] Then, most importantly, he must ask himself whether a penalty or other non-penal instruments should be used. The legislator has been asking this question since the beginning of tit. V, and in c. 1341, gives the criteria for resolution.

d) After this first problem has been positively resolved, a second question immediately arises. Which penal procedure should be used, the administrative or the judicial (cf. cc. 1720–1731)?[3] The legislator answers the question in c. 1342, by presenting the precise criteria to determine when to proceed judicially and when the merely administrative penal procedure may be used.

e) When the legislator refers to the norms regulating the penal procedure both the administratively and judicially (cc. 1717ff), he establishes that the norms laid down in succession for applying penalties are valid in their principal lines both for superiors, in the case of an administrative procedure, and for judges, in the case of a penal procedure (cf. c. 1342 § 3).

2. *The moment of application*

The norms that follow cover only the moment when the penalty is applied (they assume that the trial or hearing has already been held)—the moment when the decree in administrative penal procedures is issued or when the sentence in penal procedures is pronounced.

The legislator gives several possibilities that the superior or judge may face at the moment of the decree or sentence.

a) Since canonical penalties may be either facultative or preceptive (cf. c. 1315 § 3), and in turn determinate or indeterminate (cf. c. 1315 § 2), the legislator considers the various possibilities in separate canons (cf. cc. 1343–1344, 1349).

b) The second possibility refers to exempting or attenuating circumstances (cf. cc. 1323–1324). The legislator regulates the matter in c. 1345.

c) The third possibility is the accumulation of offenses (cf. c. 1346).

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2. Cf. J. SANCHIS, "L'indagine previa al processo penale," in *I procedimenti speciali nel diritto canonico* (Vatican City 1992), pp. 233–265.

3. Cf. A. CALABRESE, "La procedura stragiudiziale penale," in *Procedimenti speciali nel diritto canonico*, cit., pp. 267–281; V. DE PAOLIS, "Il processo penale giudiziale," in *I procedimenti speciali nel diritto canonico*, cit., pp. 283–301.

d) The fourth refers to the application of medicinal penalties (cf. c. 1347), which because of their purpose require a special procedure.

3. *Specific cases*

The legislator also considers other possibilities that merit particular attention: sanctioning a cleric (cf. c. 1350) or a procedure that ends without a sanction (cf. c. 1348).

4. *Itinerary of the penalty already applied*

After the penalty is applied, the legislator gives norms to establish the subsequent *iter*: first and foremost, the scope of the penalty's obligation is determined (cf. c. 1351), and provision is made for possible suspension of the penalty for reasons of scandal or to protect a good reputation (cf. c. 1352) and because an appeal or a recourse has been filed (cf. c. 1353).

5. *Some considerations*

Therefore the internal content of the title may have a rather strict logic. An overall judgment may be made only after reading and commenting on each and every canon. Nevertheless, some prior considerations may be useful, especially to help read them thoroughly and verify whether the solution the legislator has given such complex problems effectively reaches the objectives proposed.

a) First the legislator wished to emphasize the sense of the penalty itself, especially at the moment of application. A penalty is considered to be the ultimate instrument of recourse. The Church has many other means available that appeal more strongly to an individual's desire for liberty and that are therefore oriented towards persuasion, exhortation, convincing, and conversion. The new penal law, as brought out during the preparatory phase,[4] has tried above all to stress the Church's benignity and mercy. In the *motu proprio*[5] projected with the proposal, but then not carried out, to publish the new penal law independently, Pope Paul VI alludes to the confidence that ecclesiastical authority places in people's goodwill. Canon 1341 is understood along these lines; it may be taken as the key in reading all penal law. The same is also true of cc. 1343–1346 and 1353, which give

4. Cf. *Comm.* 2 (1970), pp. 101–102.

5. Cf. *Schema documenti quo disciplina sanctionum seu poenarum in Ecclesia latina denuo ordinatur* (Vatican City 1973).

the judge or superior ample room for discretion in applying a penalty. But it is precisely this discretion which gives rise to some perplexity about the guarantee merited by subjects' rights and about the effectiveness of penal law.[6] It is feared that such broad discretion might lead to arbitrariness on the one hand or a relaxation of discipline on the other. Although they may appear to be somewhat exaggerated, these perplexities are not totally without foundation. Neither of the two dangers can be denied. Precisely because the legislation gives ample maneuvering room, the authority with jurisdiction may take advantage of it to act arbitrarily or carelessly and negligently. In any case, without denying the difficulties, it seems best in Church discipline to run these risks rather than to have excessive recourse to penal law or appeal to rigid penal legislation. But all of this does not allow a systematic contrast between penal and pastoral law.

Even today it is not difficult to find those who contrast pastoral needs with law in the Church. The comparison is stronger when it concerns procedural norms, easily described as purely formal laws that suffocate life and serve as obstacles to charity and to justice itself. But that is not correct. All of the Church's activities are pastoral, they tend to build up the body of Christ, whether they result from an activity extendable to the function of sanctification or to teaching or governance. Juridical activity, even strictly penal activity, cannot be omitted from the broader context of pastoral approach. Although the Church does not willingly resort to penalties, it recognizes that, in some cases, they may be necessary to provide a more adequate method for its discipline and therefore, more suitable to communion (cf. c. 1317) with respect to reciprocal rights within the community and more suitable to achieving its supreme purpose, the *salus animarum* (cf. c. 1752).[7]

b) In drawing up the directive principles for revising the Code, the legislator has relied on a pastoral approach. In the Code's *Praeface*, it was requested that "to favor the pastoral care of souls, the new law must provide not only for justice, but there must be a place for charity, temperance, humaneness, and moderation by which fairness shall be found not only in the application of the laws by pastors but also in the legislation itself. Consequently, each time that it is not necessary to strictly observe a law for the public good or general ecclesiastical discipline, the extremely rigid rules are to be set aside, exhortation and persuasion should be the first resort."[8] However, if in order to safeguard justice, the legislator thought it necessary to lay out precise norms, especially procedural norms, then they cannot be allowed to be violated or omitted lightly, otherwise justice will be compromised, and the good of the Church and of souls as well.

6. Cf. F. NIGRO, in P.V. PINTO (Ed.), *Commento al Codice di Diritto canonico* (Rome 1985), p. 786.
7. Cf. V. DE PAOLIS, "La disciplina ecclesiale al servicio della comunione," in *Monitor Ecclesiasticus* 116 (1991), pp. 15–48.
8. *CIC*, Preface. Cf. also *Comm.* 1 (1969), p. 79, no. 3.

Therefore the pastoral character of the law has nothing to do with a subjective judgment that someone might make on his own, independently of the canonical norm. To be objective, judgment must mature with respect to the norms and avoid any arbitrariness, regardless of how good the intentions may be. Justice is not served by the good intentions of just any person, but by everyone respecting the norm, following the general principles and spirit of the canonical system. All this should be kept in mind with respect to the penal law system, particularly with respect to assessing the penalty and to the itinerary that must be followed. The pastoral approach allows an ample margin of discretion to a judge and a superior in applying penalties and in choosing which road to follow. This discretion was presented as a characteristic that underlines the pastoral approach in penal law. But pastoral character does not signify arbitrariness.

c) Another important problem that the legislator had to face was the channel that the penal process should follow.[9] In this case opinions contrasted with one another. There were those who attempted to require strict choice: the judicial channel. It was thought that the judicial channel offered more guarantees to the faithful and to justice. Others expressed their preference for the administrative channel, which was more flexible and respectful of individual reputations, and from the procedural point of view, it was no less sure in ensuring that justice would be served. Others suggested intermediate options. The solution in c. 1342 §§ 1–2 is the fruit of a long journey.[10] As an orientation, c. 1342 § 1 seems to lean towards the judicial channel, although in reality the judicial channel is obligatory only for perpetual expiatory penalties or for cases in which the judicial channel is expressly stipulated in the law or precept establishing the penalty. The solution, fruit of a compromise, does not appear to have calmed spirits and is still debated today.[11] Some wanted to abolish the judicial channel, including cases where the Code provides that it is obligatory; others would like to introduce the judicial channel more rigorously. Evidently, this is another open issue that still needs long and careful reflection.

d) In giving an overall view of penal law in its applicative moment, particularly with respect to the discretion granted judges and superiors, it has been written that, if such discretion is accepted, "one betrays the principle of legal certitude, the only means capable of adequately protecting the person and his rights. Certainly one can agree that the Church has different exigencies than does the civil society, and that recourse to

9. Cf. V. DE PAOLIS, "Il processo penale giudiziale," in *I procedimenti speciali nel diritto canonico*, cit., pp. 300–302.

10. Cf. *Comm.* 9 (1977), pp. 161ff. Cf. V. DE PAOLIS, "Il processo penale nel nuovo codice," in Z. GROCHOLEWSKI-V. CÁRCEL ORTÍ (Eds.), *Dilexit iustitiam* (Vatican City 1984), pp. 475–494.

11. Cf. G. DI MATTIA, "Diritto alla difesa e procedura penale amministrativa in diritto canonico," in *Fidelium Iura* 3 (1993), pp. 307–338.

penalties, as has already been demonstrated, should be considered an almost exceptional event. However, if we wish to offer authentic guarantees to both the community and to the members of which it is composed, we cannot reduce the penal system to a merely optional matter. One will say in reply, as was so effectively expressed during the project to revise the Code, that this discretionary character will be exercised strictly within the parameters fixed by law. That is why it will never be turned into an arbitrary choice. But no one realizes that it is that very plan, in its totality, which must be rejected. Unfortunately, by endowing him with such a wide power of discretion, the new law makes the judge into the *dominus* of the penal norms.[12] Apparently this choice offers assistance to neither side: not to the faithful who, in view of this wide power of discretion, could posit the existence of a certain degree of imputability; nor to the ecclesiastical society at large, which could be deprived of an adequate degree of protection in the case of a judge who is too lenient or, as we say these days, permissive. In my opinion, one must know how to wed charity with justice. The opposite tack will inevitably lead to the collapse of ecclesiastical discipline."[13] These observations deserve careful reflection. Doubts about whether the canonical penal system, which is founded on such broad discretion, was able to safeguard ecclesiastical discipline had already raised a number of perplexities during the *iter* of revision. All in all, these doubts take on their true meaning if we consider that the canonical system is a continuous appeal to the consciences of superiors and subjects. For that reason, it seems that grave or extensive abuse need not be feared.

e) Canon 1342 provides a solution for suspending penalties. Whereas the prior Code provided for the possibility of absolution in the sacramental forum if there was danger of infamy or scandal (cf. c. 2254 *CIC*/1917), the new legislation resolves the problem with automatic suspension of penalties.

12. The question was debated in the drafting phase of the *Schema*; many consulting organs complained that an excessive power of discretion had been entrusted to the judge. The reply of the Commission can be consulted in *Comm.* 9 (1977), p. 162.

13. Cf. F. NIGRO, in P.V. PINTO (Ed.), *Commento al codice di diritto canonico*, cit., p. 786.

1341 Ordinarius proceduram iudicialem vel administrativam ad poenas irrogandas vel declarandas tunc tantum promovendam curet, cum perspexerit neque fraterna correctione neque correptione neque aliis pastoralis sollicitudinis viis satis posse scandalum reparari, iustitiam restitui, reum emendari.

The Ordinary is to start a judicial or an administrative procedure for the imposition or the declaration of penalties only when he perceives that neither by fraternal correction nor reproof, nor by any method of pastoral care, can the scandal be sufficiently repaired, justice restored and the offender reformed.

SOURCES: c. 2214 § 2; Pius PP. XII, Alloc., 5 dec. 1954 (*AAS* 47 [1955] 68–70); Pius PP XII, Alloc., 5 feb. 1955 (*AAS* 47 [1955] 73)

CROSS REFERENCES: —

COMMENTARY

Velasio De Paolis, cs.

Canon 1341 is a key canon for interpreting penal law in general and the norms for applying penalties in particular. Canon 1718 remits to this canon to warn that the ordinary must decide whether or not it is proper to initiate the penal process after having included in the preliminary investigation enough elements to proceed and after having verified that the process is possible.

The Christian community is born and develops in the power of the Holy Spirit, and since the Holy Spirit is liberty, the community is built on and grows in liberty. Although penalties are necessary as long as we are subject to sin, they are not an instrument to which the Church easily has recourse, especially in our times, when the Church feels called upon to revive her faith in the Holy Spirit. That is why the new Code of Canon Law has drastically reduced penalties and, more generally, the role of penal law in Church life.[1] Canon 1317 establishes that penalties are instituted only to the extent that they are truly needed to provide better ecclesiastical

1. Cf. V. DE PAOLIS, "Il libro VI: Le sanzioni nella Chiesa," in *La Scuola Cattolica* 112 (1984), pp. 356–381; idem, "Aspetti teologici e giuridici nel sistema penale canonico," in *Teologia e Diritto canonico* (Rome 1987), pp. 175–194; idem, "L'applicazione della pena canonica," in *Monitor Ecclesiasticus* 114 (1989), pp. 69–94.

discipline. Canon 1341 gives orientation to those responsible so that, even after offenses have been committed, penal procedures may be avoided if some other way may be found to maintain ecclesiastical discipline.

That remission gives us the exact placement and precise meaning of c. 1341.

It assumes that the ordinary has carried out the preliminary investigation spoken of in c. 1717 and has identified all the elements required for a penal procedure. In particular, he will have verified all the necessary and sufficient elements to determine that there is an imputable offense, taking into consideration other circumstances (cf. cc. 1321–1324).

The elements on which the ordinary decides whether or not a penal procedure is possible are the following. Above all, there must be an offense, because the penal process is ordered for the purpose of imposing or declaring a penalty for an offense (cf. c. 1400 § 1,2°). The investigation itself tends to demonstrate the elements in its triple objectives: facts, circumstances, imputability. If there is no violation of a penal norm or if there are circumstances preventing verification of the offense or its punishability, it is not possible to start the penal process because there is no object of the process, which is an offense and its punishment. If it is a penal procedure for declaring a penalty *latae sententiae*, the norm in c. 1324 § 3 will have to be followed, which provides that, if there is any circumstance whatsoever that attenuates imputability, a penal *latae sententiae* is not applicable.

Therefore, c. 1341 gives the criteria for initiating a penal procedure when all strictly juridical elements exist. This is an eminently pastoral aspect. Even after demonstrating that all the elements required to start the penal process exist, it must not be concluded that the process must be initiated. Canon 1341 gives some references that the ordinary must keep in mind.

If we define more precisely how the canon should be interpreted, first it must be said that c. 1341 looks to the initiation of an administrative or judicial procedure. This assumes that an offense has been committed and that all the elements that might cause the procedure to be initiated are present. Canon 1718 § 1 puts it even more clearly by distinguishing between the elements to take into account for initiating a penal procedure and the elements that determine the opportunity to do so. With reference to the opportunity, it cites c. 1341.

The immediate and proximate purpose of a penal procedure is to impose or declare a penalty. However, its ultimate purpose is not to punish, but to obtain the purpose of the penalty. In the canonical system, in accordance with the few canons that treat the matter, the purpose of penalties is triple: to repair scandal, re-establish justice, correct the offender (cf. cc. 1341, 1347 § 1). If one looks at these three purposes from the perspective of the distinction between medicinal and expiatory penalties

(cf. c. 1312 § 1), the first two fall under the expiatory purpose, the third under the medicinal purpose. However, re-establishing justice also includes repair and redress of the harm, which are not the objects of a penal procedure. In addition, the distinction between medicinal and expiatory penalties does not mean a separation of purpose to the point that expiatory excludes medicinal and medicinal excludes expiatory. In reality, the meaning of these distinctions must be understood as within the juridical system itself, by virtue of descriptions and effects assigned by the legislator. They are not philosophical or theological distinctions.

Having said that, those purposes cannot be ignored. The Church cannot remain passive or indifferent to offenses committed within it. That would be to betray its very mission and, for pastors, it would be to ignore their responsibilities. Certainly, c. 1341 cannot signify indifference to an offense or passiveness in the task of re-establishing justice or helping the faithful to return to the road of conversion and salvation. The problem is to discern which road to follow to eliminate the consequences of delinquent actions. The penal channel is one such road, but it is not the only one, nor even always the right one. Therefore, the perspective of c. 1341 is precisely to give us the choice of road. As a first measure, it prescribes a fraternal meeting and dialog (*correctio fraterna*), then penal remedies (*correptio*), which may be described as "paths or methods of pastoral care." Their judicial relevance is, naturally, not excluded. These measures are seen as substitutes for the penal law. Consequently, the resources of pastoral care include all methods for obtaining the ends for which the penal channel was conceived and designed, but which remain outside the penal channel. If the purposes of a penalty may be achieved "sufficiently," it does not say *better than* or *similarly to* with a penal procedure,[2] then the penalty may be, and in a certain sense, should be, waived. In any case, the trial falls within the jurisdiction of the same superior who initiated the action.

In reality it is not always easy to determine that the purposes of a penalty are sufficiently achieved by means external to a penal procedure. We must say that the three ends should be achieved sufficiently regardless of the offense committed or the penalty provided, whether medicinal or expiatory. Beyond the properly penal purpose, justice should also be re-established and damage repaired, which are not properly penalties nor the objects of the penal channel.

2. Cf. *Comm.* 9 (1977), p. 160.

1342 **§ 1. Quoties iustae obstent causae ne iudicialis processus fiat, poena irrogari vel declarari potest per decretum extra iudicium; remedia poenalia autem et paenitentiae applicari possunt per decretum in quolibet casu.**

§ 2. Per decretum irrogari vel declarari non possunt poenae perpetuae, neque poenae quas lex vel praeceptum eas constituens vetet per decretum applicare.

§ 3. Quae in lege vel praecepto dicuntur de iudice, quod attinet ad poenam irrogandam vel declarandam in iudicio, applicanda sunt ad Superiorem, qui per decretum extra iudicium poenam irroget vel declaret, nisi aliter constet neque agatur de praescriptis quae ad procedendi tantum rationem attineant.

§ 1. Whenever there are just reasons against the use of a judicial procedure, a penalty can be imposed or declared by means of an extra–judicial decree; penal remedies and penances however may in any case whatever be applied by a decree.

§ 2. Perpetual penalties cannot be imposed or declared by means of a decree; nor can penalties which the law or precept establishing them *forbids* to be applied by decree.

§ 3. What the law or decree says of a judge in regard to the imposition or declaration of a penalty in a trial, is to be applied also to a Superior who imposes or declares a penalty by an extra-judicial decree, unless it is otherwise clear, or unless there is question of provisions which concern only procedural matters.

SOURCES: § 2: c. 1933 §§ 2 et 4
§ 3: Pius PP. XII, Alloc., 5 dec. 1954 (*AAS* 47 [1955] 66)

CROSS REFERENCES:

COMMENTARY

Velasio De Paolis, cs.

1. If the ordinary deems it opportune to initiate penal proceedings, the next step to be decided is which process to use, the administrative or the judicial? To resolve this question, the ordinary should reference c. 1342, which gives a general principle in § 1 and establishes specific criteria in § 2.

The general principle in § 1 is the fruit of a long and laborious task. The initial intention was very clear: to favor the judicial process over the administrative. However, this intention was weakened with each

successive draft, until it was almost imperceptible in the actual formulation. The first draft spoke of the *causae graves* necessary before the judicial process could be abandoned in favor of the administrative process; in addition, "probationes de delicto evidentes" was required. The discussion that arose in the *Coetus* over this canon was started by people who were not satisfied with the formula; they preferred a wording that made it obligatory to apply penalties via the judicial process in all cases. But other consultors were opposed to that proposal. Although they understood the reasons for seeking an obligatory judicial process(that is, to ensure justice in applying penalties), they appealed to the evidence of the facts, which requires a flexible and expeditious instrument, which is precisely what the administrative channel is. Then they referred to the draft of the canon claiming that it clearly indicated the legislator's preference for the judicial channel. Some even wanted to correct the canon, to eliminate any preference and make the administrative and judicial channels equal. That proposal, however, failed. The conclusion was that the wording should remain unchanged.[1]

There was another discussion over the expression "et probationes de delicto evidentes sint." Among those that did not approve of the preference given to the judicial channel, someone proposed that the expression be eliminated. The reason adduced was that there were guarantees in the administrative norms no less sure than the guarantees for the judicial process. That proposal was accepted.

It is clear that the drafts of the canon were changed, since, in the final text, instead of *graves causae*, there is only *iustae causae*, and the phrase "et probationes de delicto evidentes sint" disappeared completely.[2]

2. An examination of the final draft of § 1 shows that the preference for the judicial channel continued. Paragraph 2 establishes that perpetual penalties cannot be incurred automatically or by decree (meaning, administratively) referring to penalties that are perpetual by their nature and to penalties incurred *de facto* that are perpetual. Among penalties that are perpetual by nature is expulsion from the clerical state, which can be established only by universal law (cf. c. 1317) and which is perpetual by nature, although there is provision for the possibility of readmission by indult from the Holy See (cf. c. 293).

A second case that requires the judicial process occurs when a universal or particular penal law or a penal precept prohibits proceeding with the administrative process. This possibility is dictated above all by the principle of prudence; the legislator does not want to close off the possibility of an obligatory resolution to certain situations by means of a

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1. Cf. *Comm.* 9 (1977), p. 161. Cf. V. DE PAOLIS, "Il processo penale del nuovo codice," in Z. GROCHOLEWSKI-V. CÁRCEL ORTÍ (Eds.), *Dilexit iustitiam* (Vatican City 1984), pp. 473–494.
2. Cf. *Comm.* 9 (1977), p. 161.

judicial penal process. Also, in this case the principle of subsidiarity should be applied. Situations within the Church, so varied and diversified, make it natural that there should be a different sensitivity in this matter. This sensitivity is keenly felt in the wording of the text. With § 2, the universal legislator authorizes the particular legislator, within his proper jurisdiction, to make the judicial process for imposing penalties process obligatory.

It may be asked whether a particular legislator, within his own jurisdiction, may make the penal process obligatory with respect to the penal laws of the universal Church. In c. 1315 § 3, we find a reason to lean towards an affirmative response, since it permits the particular legislator to protect universal laws that are not penal with penal sanctions or even to add other penalties to those established by the universal legislator. But the response should be negative. Remission to c. 1315 is not pertinent, and c. 1342 § 2 provides for the possibility of making the judicial penal process obligatory only at the constitutive moment of the law or penal precept.

After those considerations, we must conclude that the penal process is still the process preferred by the canonical legislator.[3]

3. Canon 1342 §§ 1–2 is limited to determining which channel should be followed. It is a norm of substance. For penal process norms, we are referred to book VII, specifically to cc. 1717–1731. But knowing that there are two possible processes, before formulating the subsequent norms, the legislator cannot ignore the fact that the norms are theoretically equally valid in the administrative penal process and in the judicial penal process. In the first case, the superior acts hierarchically; it is he who concludes the process with a decree (cf. c. 1720). In the second, the judge acts in court (cf. cc. 1721ff), and there should be three judges if the case concerns penal causes that might involve expulsion from the clerical state or if excommunication might be imposed or declared (cf. c. 1425 § 1,2°). The principle established in c. 1342 § 3 is that, when imposing or declaring a penalty, the same norms prescribed for the judge apply to the superior. However, two exceptions are immediately added to that principle: if is a question of procedural norms or if there is a different provision. With regard to procedural norms, the Code provides for different norms depending upon whether the procedure is administrative (cf. c. 1270) or judicial (cf. c. 1721ff).

4. We can ask which superior may impose or declare a penalty in the administrative channel. The question was asked in the text-revision phase but received an evasive response, with remission to the principles of administrative acts.[4] "It does not seem to me," writes Nigro,[5] "that who-

3. Cf. V. DE PAOLIS, "Il processo penale...," cit., pp. 486ff.
4. Cf. *Comm.* 9 (1977), p. 162.
5. Cf. F. NIGRO, commentary on c. 1343, in P.V. PINTO (Ed.), *Commento al Codice di Diritto canonico* (Rome 1985).

ever is able to issue a precept by virtue of the ordinary executive power which he enjoys, is automatically able to issue penal precepts, even if it be, moreover, the superior dealt with in § 3 of this canon. As I have stated elsewhere, I opt for a restricted interpretation, which excludes general and episcopal vicars lacking a special mandate from the bishop." This is the interpretation used in current practice. The Vicar General needs a mandate from the bishop to initiate an administrative proceeding. We should note, however, that major superiors in clerical institutes of pontifical right enjoy power of jurisdiction in the external forum (cf. c. 596 § 2) and are therefore ordinaries (cf. c. 134 § 1). Therefore they too may initiate a procedure of this type, depending on the specific details in the law itself. Chiappetta notes that the norm in § 3 "does not admit of reciprocity, because what is precribed in the law or precept, in relation to the ordinary, regarding the imposition or declaration of the penalty by administrative decree, is not applied to the judge who inflicts or declares the penalty through a judicial sentence."[6]

6. L. CHIAPPETTA, commentary on c. 1343, in *Il codice di Diritto canonico*, vol. II (Rome 1988).

1343 Si lex vel praeceptum iudici det potestatem applicandi vel non applicandi poenam, iudex potest etiam, pro sua conscientia et prudentia, poenam temperare vel in eius locum paenitentiam imponere.

If a law or precept gives the judge the power to apply or not to apply a penalty, the judge may also, according to his own conscience and prudence, modify the penalty or in its place impose a penance.

SOURCES: c. 2223 § 2; PIUS PP. XII, Alloc., 5 dec. 1954 (*AAS* 47 [1955] 66)

CROSS REFERENCES: —

COMMENTARY

Velasio De Paolis, cs.

The laws of the Church are not always connected with penal sanctions, and neither are the precepts (cf. c. 49) of the superiors. The reason is that every norm is already endowed with a sanction that transcends penal law, the sanction of conscience. The Church's laws demand obedience by their very nature, as Pope John Paul II noted in the Constitution *Sacrae Disciplinae leges*, with which the current Code was promulgated. In addition, before having recourse to the penal area, the Church's intervention has many other areas where it can operate, in the internal forum (including the sacramental, cf. c. 130) and the non-penal external forum. Therefore, the fact that most ecclesiastical laws carry no penal sanction does not mean that they do not obligate the conscience or that ecclesiastical discipline is not sufficiently ensured. Furthermore, the effectiveness of ecclesiastical laws is derived above all from their appeal to the conscience of the faithful.

Even when there is a penal sanction, it is not always provided as preceptive. Canon 1315 § 3 says that a penalty may be facultative. There are many penal laws in the Code that provide only a facultative penalty. Offenses that carry a *latae sententiae* penalty usually also provide for a facultative penalty (cf. cc. 1364, 1367, 1370, etc.). But it is not unusual to provide for only one penalty, and for that penalty to be facultative (cf. cc. 1390 §§ 2–3; 1391, etc.).

Canon 1343 goes further in explaining the judge's or superior's discretion in applying facultative penalties. Not only may they proceed to apply the sanction provided or not, but they may apply a milder penalty or

even impose only a penance (cf. c. 1340). But they may not proceed arbitrarily; the Code appeals to their conscience and prudence. Their conscience will prevent them from operating if it is not according to good and justice; prudence requires them to seek the best solution for the common good of the Church according to the spirit and principles of the canonical system, especially with respect to penal law.

1344 Etiamsi lex utatur verbis praeceptivis, iudex pro sua conscientia et prudentia potest:

1° poenae irrogationem in tempus magis opportunum differre, si ex praepropera rei punitione maiora mala eventura praevideantur;

2° a poena irroganda abstinere vel poenam mitiorem irrogare aut paenitentiam adhibere, si reus emendatus sit et scandalum reparaverit, aut si ipse satis a civili auctoritate punitus sit vel punitum iri praevideatur;

3° si reus primum post vitam laudabiliter peractam deliquerit neque necessitas urgeat reparandi scandalum, obligationem servandi poenam expiatoriam suspendere, ita tamen ut, si reus intra tempus ab ipso iudice determinatum rursus deliquerit, poenam utrique delicto debitam luat, nisi interim tempus decurrerit ad actionis poenalis pro priore delicto praescriptionem.

Even though the law may use obligatory words, the judge may, according to his own conscience and prudence:

1° defer the imposition of the penalty to a more opportune time, if it is foreseen that greater evils may arise from a too hasty punishment of the offender;

2° abstain from imposing the penalty or substitute a milder penalty or a penance, if the offender has repented and repaired the scandal, or if the offender has been or foreseeably will be sufficiently punished by the civil authority;

3° may suspend the obligation of observing an expiatory penalty, if the person is a first-offender after a hitherto blameless life, and there is no urgent need to repair scandal; this is, however, to be done in such a way that if the person again commits an offence within a time laid down by the judge, then that person must pay the penalty for both offences, unless in the meanwhile the time for prescription of penal action in respect of the former offence has expired.

SOURCES: cc. 2223 § 3,1° et 2°, 2288; Pius PP. XII, Alloc., 5 dec. 1954 (*AAS* 47 [1955] 66); Pius PP. XII, Alloc., 5 feb. 1955 (*AAS* 47 [1955] 75)

CROSS REFERENCES: —

COMMENTARY

Velasio De Paolis, cs.

Canon 1344 examines the case of a preceptive penalty, which may be determinate or indeterminate. Canon 1315 § 2 explicitly states that the law may provide a determinate penalty or may leave the penalty to be determined by the prudent deliberation of the judge or superior; that is, at the same time that the legislator places his confidence in the discretion of the judge or superior, he reminds them that their decision should be the fruit of reflection and deliberation. The judgment should be prudent, the consequence of prudent assessment and evaluation.

If the canonical system provides a preceptive penalty, even if it is indeterminate, the judge must impose it. These are the cases in which the principle of "nulla poena sine lege poenali praevia" is applied most rigorously. In this case, the legislator has not only provided a possible sanction (facultative penalty), although without indicating which one (indeterminate penalty), but has also established the necessity of the sanction, although he has not always indicated a specific sanction. These are offenses that are considered particularly grave, for which the legislator wishes to increase the dissuasive force of deterrence as a preventive. Nevertheless, these are general assumptions; the judge must verify their validity case by case, using general principles and specific canonical norms. Canon 1344 intends to offer criteria in the form of various hypotheses within which a superior must work. Assessment of the hypotheses is left to the conscience and prudence of the judge himself (for an assessment of these terms, see commentary on c. 1343).

a) *Danger of greater evils*

First of all, a judge may defer the penalty until a more opportune time "if it is foreseen that greater evils may arise from a too hasty punishment of the offender" (n. 1°). This is not a waiver of the sanction nor a suspension of the penalty, which has not yet been applied, nor a mitigation or the substitution of a milder penalty, but a postponement until a more opportune time. The reason is a fear of greater evils, for the individual and, more probably, for the community. The individual or the community emotionally tied to the person to be punished may be in a state of great tension. In such a situation, a sanction might do harm and so be inopportune and precipitate. But it cannot be a matter of simple tolerance nor of showing indifference. The answer is to try to clarify the situation and calm people down.

b) *Circumstances that must be examined with equity*

There are some circumstances that lead the judge to re-examine the justice or equity of the penalty provided. The circumstances are indicated in no. 2°: "if the offender has repented and repaired the scandal, or has

been or foreseeably will be sufficiently punished by the civil authority." These are attenuating circumstances that are not provided among the many listed in c. 1324. Properly speaking, they cannot even be defined as such, because they refer to the imputability of the offender, whereas the circumstances stated in this canon do not look to the imputability of the offender, but are circumstances that are external thereto. In any case, they merit consideration in other aspects, particularly equity in general, because the purpose of the penalty is partially lost once the offending member of the faithful has repented and repaired the scandal, or because he has been sufficiently punished or certainly will be by the civil authority.

In those circumstances, a superior may abstain from imposing the penalty or may impose a milder penalty or only a penance. The choice will be made with reference to the indicated circumstances.

If the offender has already repented and has repaired the scandal, we have the case indicated in c. 1341. It will not be necessary to initiate penal proceedings. If the circumstances arise after the proceedings have begun, the fundamental principle of c. 1341 shall be applied; there is no reason to apply the penalty.

The legislator does not impose an obligation upon the judge to abstain from the penalty; he merely offers the possibility.

The other reason a judge might abstain from, mitigate or substitute a penalty is when the offender has already been punished, or it is foreseen that he will be by the civil authority. Some actions are designated as offenses by both canon law and civil law. The reasons, however, are diverse, which is also generally true of the criteria for the sanction and the sanction itself. Penalties in civil society are included in the area of temporal matters (jail, fines, etc.), whereas ecclesiastical penalties are of a spiritual order (medicinal penalties and expiatory penalties). For example, homicide is punished in both legal systems, but canon law provides spiritual penalties (the only kind available to the Church), both medicinal and expiatory (cf. c. 1397 in relation to c. 1370). In this case, a civil sanction, already served or foreseeably so, does not excuse a judge from ecclesiastical penalties. We are on a different plane, and ecclesiastical penalties have a different basis and nature. The case in this canon may appear somewhat strange, but it cannot be excluded that in some cases, there might be a convergence in punishment for a single offense. It could be unfair that a single offense might be punished in both systems, and thus twice. In any case, civil punishment may be a sufficient reason to abstain from applying a penalty, or mitigating it, or substituting a penance.

c) *Conditional suspension of the penalty*

The case of a possible conditional suspension of a penalty is described in no. 3°. Conditional suspension of a penalty assumes that the proceedings closed with a judgment of guilty, and the penalty was imposed. The execution of the penalty is suspended, in consideration of the

fact that this is a first offense and the offender had until then led an exemplary life. If suspending the penalty is an act of clemency and equity, it is also a warning not to offend again, otherwise the offender will have to expiate both the prior penalty and the penalty owed for the new offense. It must be emphasized that conditional suspension of a penalty is provided only for expiatory penalties. For medicinal penalties, it would make no sense, for they are remitted when the offender ceases in obstinacy (cf. c. 1358).

However, the time elapsed between the penalty for the first offense and the time of the second offense should not be so long that the prescription of penal action for the prior offense should come into play, according to the norm in cc. 1362–1363. In effect, when the indicated time has elapsed, the case against a person disposed to offend loses its validity. Circumstances do not allow the offender to be considered to be a recidivist (cf. c. 1326 § 1,1°).

A penalty may be suspended in the case of *ferendae sententiae* penalties as well as *latae sententiae* penalties. Provided that there is a proceeding for declaring the penalty, the superior or judge at the time of declaring it may suspend a *latae sententiae* conditionally, just as if it were a *ferendae sententiae* penalty.[1]

1. Cf. L. CHIAPPETTA, commentary on c. 1344, in *Il Codice di Diritto canonico*, vol. II (Rome 1988).

1345 **Quoties delinquens vel usum rationis imperfectum tantum habuerit, vel delictum ex metu vel necessitate vel passionis aestu vel in ebrietate aliave simili mentis perturbatione patraverit, iudex potest etiam a qualibet punitione irroganda abstinere, si censeat aliter posse melius consuli eius emendationi.**

Whenever the offender had only an imperfect use of reason or committed the offence out of fear or necessity or in the heat of passion or with a mind disturbed by drunkenness or a similar cause, the judge can refrain from inflicting any punishment if he considers that the person's reform may be better accomplished in some other way.

SOURCES: cc. 2218 § 1, 2223 § 3,3°; Pius PP. XII, Alloc., 5 dec. 1954 (*AAS* 47 [1955] 66); Pius PP. XII, Alloc., 26 maii 1957 (*AAS* 49 [1957] 405)

CROSS REFERENCES:

COMMENTARY

Velasio De Paolis, cs.

The circumstances c. 1345 speaks of require reference to other canons that treat exempting, attenuating or aggravating circumstances; they are cc. 1323–1326 (see respective commentaries).

Canon 1323 lists the circumstances that exempt from penalty. Strictly speaking, some of them exempt from the offense rather than from the penalty,[1] but c. 1324 lists the penalties that attenuate imputability. In that case, the penalty should be mitigated or substituted by a penance. Some circumstances, such as fear and necessity, are considered exempting causes (cf. 1323,4°) and also attenuating causes (cf. c. 1324 § 1,5°). Finally, other circumstances (drunkenness, the heat of passion, and mental disturbances) are taken into consideration as causes that attenuate imputability (cf. c. 1324) and in other respects (cf. c. 1325). On the contrary, in c. 1324 the imperfect use of reason is considered only as a cause that attenuates imputability.

These references are necessary to interpret c. 1345. In the foundation of the norm, there is the need for an offense to have been committed, and, therefore, there is grave imputability for the subject, *ex dolo* or *ex*

1. Cf. V. DE PAOLIS, "Le sanzioni nella Chiesa," in *Il diritto nel misterio della Chiesa*, vol. III, 2nd ed. (Rome 1992), pp. 468ff.

culpa (cf. c. 1321 §§ 1–2). If there were no grave imputability, there would not be an offense. The provision in c. 1321 § 2 must also be kept in mind; it states that only offenses *ex dolo* are punishable, unless the law or precept also establishes a sanction for offenses *ex culpa*. Therefore fear, necessity, heat of passion or other disturbances of the mind are attenuating causes only to the degree that they are not already causes that exempt the offense (because there is no grave imputability), or punishability itself (cf. c. 1323). In that case, there is no way to inflict punishment, for the norm states that there is no subject for sanction. Therefore, the sanction cannot be subrogated by a penance. It appears that the assumption in c. 1345 is not applicable to drunkenness or other disturbances of the mind willfully sought so as to commit the offense or find an excuse to commit it, nor is it applicable to deliberately aroused or fostered passion (cf. c. 1325).

Canon 1345 should be interpreted in the light of c. 1324 only for causes that attenuate the penalty. With c. 1345, not only is the penalty mitigated or substituted for by a penance, but judges and superiors are authorized to refrain from punishment. One more condition is required for this: it is not sufficient that there be an attenuating cause; it is also required that the absence of any type of punishment be a more appropriate means to reform the offender.

This norm continues in the lines of the canonical legislator's benignity. But the question may be raised as to whether it is right to give such power to superiors in addition to judges. "The judge has been turned into the *dominus* of the law, for he has been entrusted with the decision to apply the penalty or not, on the condition that he be persuaded that he can better provide for the amendment of the plaintiff by other means."[2] During the revision phase of the *Schema*, the suggestion was made not to give this power to judges but to superiors, who can remit the penalty and at the same time have other means available to provide adequately for any abnormal situation of the subject.[3]

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2. F. NIGRO, commentary on c. 1345, in P.V. PINTO (Ed.), *Commento al Codice di Diritto canonico* (Rome 1985).
3. Cf. *Comm.* 9 (1977), p. 163.

1346 Quoties reus plura delicta patraverit, si nimius videatur poenarum ferendae sententiae cumulus, prudenti iudicis arbitrio relinquitur poenas intra aequos terminos moderari.

Whenever the offender has committed a number of offences and the sum of penalties which should be imposed seems excessive, it is left to the prudent decision of the judge to moderate the penalties in an equitable fashion.

SOURCES: c. 2224 § 2; Pius PP. XII, Alloc., 5 dec. 1954 (*AAS* 47 [1955] 66)

CROSS REFERENCES: —

COMMENTARY

Velasio De Paolis, cs.

It may happen that a superior should punish a member of the faithful who has committed more than one offense because he has committed various delinquent acts, physically and numerically distinct, repeating the same delinquent act several times or committing various specifically diverse delinquent acts (actual concurrence). Or, he may have committed a single delinquent act which violates several penal laws (ideal concurrence).

In canon law as in Roman law, there is the principle that each offense has its own malice and therefore should have its own sanction.[1]

Since application of a penalty may mean both imposition of a penalty *ferendae sententiae* and declaring the penalty *latae sententiae*, multiplication of penalties may consist either in imposing various penalties or declaring various penalties that have already been incurred.

The purely mechanical calculation of the number of offenses and penalties (that is, one penalty for each offense committed)would entail the rigid application of the juridical norms without taking into account the actual situation of a person. The calculation can easily be inequitable. This is especially true for penalties in the Church, particularly with censures. Although juridically it is possible to understand the meaning of several

1. Cf. G. Michiels, *De delictis et poenis*, II. *De poenis in genere* (Paris 1961), pp. 194ff.

excommunications applied to the same person, in reality, aside from the number of excommunications he might be affected by, the excommunicated subject suffers no more effects than if he had been excommunicated only once. Canon 1346 gives the authority with jurisdiction the discretion to resolve these cases.

In both practice and doctrine, diverse tendencies are expressed in the statement of different principles, such as: 1) the principle of material accumulation of the penalty, formulated as "tot poenae quot delicta," by which as many penalties are imposed as there are offenses; 2) the principle of absorption, formulated as "poena maior absorbet minorem," by which only the heaviest penalty is imposed from among those provided for the various offenses; 3) the principle of juridical accumulation, in which the heaviest penalty is applied, and to it are added other lesser penalties, as if the other offenses were aggravating circumstances; or, the sum of the penalties that should be imposed for each one of the offenses is mitigated so that a non-arithmetical juridical proportion is maintained between offenses and penalties, keeping in mind the number and gravity of offenses and the offender's imputability.

The immediate source of c. 1346 is c. 2224 of *CIC*/1917, which stated the principle of the material accumulation of penalties: "Ordinarie tot poenae quot delicta." This principle was valid for both actual and ideal concurrence. Immediately thereafter, however, the old canon gave corrective norms for cases where material accumulation was excessive. The judge could then apply the heaviest penalty and add to it a penance or penal remedy, or make an equitable reduction in the sum of the penalties based on the number and gravity of the offenses. The legislator was giving the subsidiary criterion of juridical accumulation and excluding the principle of simple absorption of the lesser penalty into the greater. The principle of absorption was, however, applied to cases where a penalty was provided for both an attempted and a consummated offense; in such a case, only the penalty for the consummated offense could be applied.

Following the criterion of mitigation in penal law, the present Code no longer explicitly states the principle of material accumulation. However, that principle is in some manner implicit, since the legislator allows the judge or superior to have recourse to juridical accumulation only when material accumulation appears excessive. But the fact that the principle of material accumulation is not explicitly stated indicates a tendency towards mitigation.

The canon grants judges the power to apply penalties within the limits of equity, if a purely literal application would lead to an excessive accumulation of penalties. It adopts the principle of juridical accumulation, although in only one of its two possible formulations. However, in the generic wording of the canon, although the principle of material accumulation is not mentioned, it also does not appear to be excluded.

Finally, the canon is limited solely to *ferendae sententiae* penalties. *Latae sententiae* penalties are automatically incurred without the intervention of a superior or a judge. Nothing other than the principle of material accumulation may be applied. It may be debatable whether this means that the norm intends to exclude the possibility of declaring as many penalties as there are offenses. The question was discussed in the revision of the *Schema*, and the text was written in such a way as to exclude that possibility.

1347 **§ 1. Censura irrogari valide nequit, nisi antea reus semel saltem monitus sit ut a contumacia recedat, dato congruo ad resipiscentiam tempore.**

§ 2. A contumacia recessisse dicendus est reus, quem delicti vere paenituerit, quique praetera congruam damnorum et scandali reparationem dederit vel saltem serio promiserit.

§ 1. A censure cannot validly be imposed unless the offender has beforehand received at least one warning to purge the contempt, and has been allowed suitable time to do so.

§ 2. The offender is said to have purged the contempt if he or she has truly repented of the offence and has made, or at least seriously promised to make, appropriate reparation for the damage and scandal.

SOURCES: § 1: c. 2233 § 3; CodCom Resp. XV, 14 iul. 1922 (*AAS* 14 [1922] 530)
§ 2: c. 2242 § 3; Pius PP. XII, Alloc., 5 feb. 1955 (*AAS* 47 [1955] 73, 82); Paulus PP. VI, Alloc., 4 oct. 1969 (*AAS* 61 [1969] 711)

CROSS REFERENCES:

COMMENTARY

Velasio De Paolis, cs.

1. In canonical tradition, the distinction between medicinal and expiatory penalties is important. The legislator wanted to keep this distinction in *CIC* (cf. c. 1312 § 1) and regulated it in the same way as in the prior Code, although there were some who proposed abolishing the distinction. But it is the hinge on which all of canonical penal law turns.[1] One of the novelties that stands out is the change of the word *vindicativa* in *CIC*/1917 for *expiatoria* in the current Code, to underline the quality of expiation more than vengeance.[2]

The nature of medicinal penalties, which immediately and directly intend to reform the offender, requires that they be imposed only upon someone who is in contempt, that is, someone who has committed an

1. Cf. *Comm.* 8 (1976), p. 169.
2. Cf. *Comm.* 2 (1970), p. 101.

offense and persists in it. In that case the offender needs the medicine of the penalty, which the Church gives him to lead him back to the right path. The medicinal nature of the penalty requires that it not be imposed until malice or contempt has been demonstrated. The instrument to demonstrate it is the canonical warning, required for the valid imposition of a penalty.

This does not mean that, in some cases, a canonical warning is not also required to impose certain expiatory penalties (cf. c. 1395 § 1). However, what is an exceptional case in imposing expiatory penalties is the necessary rule for imposition of medicinal penalties or censures. An admonishment, a summons made to the offender by the judge or superior, and a reproach for the offense committed, with the warning that the offender will incur a censure unless a correction is made, is a necessary element of a medicinal penalty.[3]

The source of § 1 is c. 2233 § 2 of *CIC*/1917. There is, however, an express warning that admonishment is required for valid imposition of a penalty. This was admitted by doctrine in relation to the prior Code, but it was not explicitly stated in the norm.[4] Also, current discipline indicates that an admonishment is required for validity. However, that does not exclude the possibility of proceeding with more admonishments. It also imposes the requirement of giving the offender a reasonable period of time to correct himself, whereas in prior discipline this matter was left to the judgment of the judge or superior.

Prior admonishment is not necessary for violations of a penal precept that provides for a penalty *ferendae sententiae*; this was stated by the Pontifical Commission for interpreting *CIC*/1917.[5] In that case the admonishment is present in the precept itself. In such a case, if the offender ceases in contempt before appearing at trial, he may not be punished.[6]

Admonishment is not required to declare a *latae sententiae* penalty that has already been incurred. In a prior *Schema*, it was written that an admonishment was required to declare the penalty. In the final text, that requirement disappeared.[7]

The old c. 2242 required contempt to be able to punish with any censure, both *latae* and *ferendae sententiae*. In c. 2242 § 2, the text distinguished between one type of contempt for *latae sententiae* penalties and another for *ferendae sententiae* penalties. In the first case, a person was in contempt who, with knowledge of the penal norm, voluntarily violated

3. Cf. E.F. Regatillo, *Institutiones iuris canonici*, II, 6th ed. updated, (Santander 1961), p. 518.
4. Ibid.
5. Cf. *AAS* 14 (1922), p. 530.
6. Cf. A. Vermeersch-J. Creusen, *Epitome iuris canonici*, III, 6th ed. (Rome 1946), no. 427, 2°.
7. Cf. *Comm.* 9 (1977), p. 164.

it. But in the second case a person was in contempt who, in spite of having been admonished, persisted in the offense, or, after committing it, refused to repent and to make due reparation for the damage and scandal.

2. Paragraph 2 also establishes when we can speak of having purged contempt; the source is the old c. 2242 § 3. It is required that the offender have truly repented of the offense committed. This underlines the inner dimension. However, repentance also requires that the offender eliminate the consequences of his act. In particular, he should adequately repair the damage and scandal. Repentance cannot merely be a simple internal act of will; it also carries with it the commitment to re-establish the order that has been harmed. Sincerity of repentance is verified precisely by that commitment.[8] Theoretically, effective reparation is required to be able to speak of cessation of contempt. Sometimes, however, a serious promise to make reparation is sufficient. Judgment on the cessation of contempt, if it involves application of a penalty, is a task for the superior who possesses the jurisdiction to impose the penalty.

8. Cf. *Comm.* 9 (1977), p. 171.

1348 Cum reus ab accusatione absolvitur vel nulla poena ei irrogatur, Ordinarius potest opportunis monitis aliisque pastoralis sollicitudinis viis, vel etiam, si res ferat, poenalibus remediis eius utilitati et publico bono consulere.

When the person has been found not guilty of an accusation, or where no penalty has been imposed, the Ordinary may provide for the person's welfare or for the public good by opportune warnings or other means of pastoral care, and even, if the case calls for it, by the use of penal remedies.

SOURCES: cc. 2223 § 3,3°, 2229 § 4

CROSS REFERENCES:

COMMENTARY

Velasio De Paolis, cs.

1. With regard to this canon, Nigro says: "A provision of our penal system is that the one who executes the sentence is not the judge, but the ordinary; however, once the judicial *iter* has concluded with the censure or the absolution of the accused, the task of the judge is over, and the competence to oversee the next stage passes to the ordinary, who makes use of pastoral means to adopt those subsequent decisions which might serve to assure the good of the accused and the public good. There is an express suggestion that this can be brought about by recourse to penances or to penal remedies, insofar as the specific situation may counsel."[1]

The person for whom this canonical norm was designed is the ordinary, not the judge, since the canonical system does not attribute the power to execute a penalty to the judge, but to the ordinary (cf. c. 1653 § 1). It is the task of the ordinary to decide whether or not a penal procedure should be initiated (cf. c. 1341) and which process to adopt, the administrative or the judicial (cf. c. 1342). The same ordinary also has the task of executing the judicial sentence. If the trial ends with absolution or no sanction whatsoever, the ordinary has nothing to execute since the court has handed down no sentence. However, regardless of the court's sentence, there may be administrative reasons to proceed on his own account as superior.

1. F. NIGRO, commentary on c. 1348, in P.V. PINTO (Ed.), *Commento al Codice di Diritto canonico* (Rome 1985).

2. Canon 1348 establishes two hypotheses: that an offender is absolved of any accusation; or while it is recognized that the offense is imputable to him, that no punishment is imposed upon him.[2]

With regard to the first assumption, the offender may be absolved because he committed no offense; that is, he is found innocent. But he may also be absolved and found innocent because the offense of which he is accused could not be proved. Nevertheless, his behavior may arouse many perplexities. If the offender was found innocent and discharged of any accusation, the ordinary evidently may not proceed, even with pastoral means. On the contrary, if, independently of the judicial process, the ordinary has reason to proceed in the administrative channel, then he keeps his liberty intact separately from the court trial. In any case, his measures would have no relation to the judges' sentence. Pastoral means could be adopted as provided in the Code and following the procedures in the Code.

But the offender may have been found guilty and still not be punished. The Code leaves the judge ample discretion to abstain from imposing a penalty; cc. 1343–1345 admit the possibility that a judge might not proceed to impose a sanction. We must also remember all the cases especially provided for in c. 1323, in c. 1324, and in c. 1327. For the second assumption, the ordinary may proceed with pastoral means and with penal remedies. The purpose of those measures is the good of the individual and the public good.

The ordinary may have recourse to those means, but is not obligated thereby, at least juridically. There could arise an obligation of conscience in a case where he deems his interventions necessary.

2. Cf. *Comm.* 16 (1984), p. 44.

1349 Si poena sit indeterminata neque aliud lex caveat, iudex poenas graviores, praesertim censuras, ne irroget, nisi casus gravitas id omnino postulet; perpetuas autem poenas irrogare non potest.

If a penalty is indeterminate, and if the law does not provide otherwise, the judge is not to impose graver penalties, especially censures, unless the seriousness of the case really demands it. He may not impose penalties which are perpetual.

SOURCES: c. 2223 § 1

CROSS REFERENCES: —

COMMENTARY

Velasio De Paolis, cs.

1. Indeterminate penalties are not favored by the legislator. First, they lack adequate force as preventive dissuasion, and second, except with certain caveats, they do not sufficiently ensure justice for the offender, because they leave ample room for discretion by the judge or superior. Therefore, the legislator prohibits imposing indeterminate penalties by precept (cf. c. 1319 § 1). When a superior imposes a penal precept, he should have adequate knowledge of the situation to properly determine a penalty proportionate to the offense. This is why the universal legislator permits the particular legislator to determine a penalty that in universal law is indeterminate (cf. c. 1315 § 2). Nevertheless, indeterminate penalties continue to be a necessity in the canonical juridical system. The various situations and various degrees of an offender's imputability require that, for a just sanction, this diversity must be taken into consideration. Therefore, it is the correct administration of justice that demands that, in some cases determination of the penalty be left in the hands of the superior or judge, as indicated in c. 1315 § 2. Canon 1349, however, introduces corrective measures to avoid an excess of rigor. Canon 1349 implicitly establishes a certain hierarchy of gravity among the penalties: censures, perpetual expiatory penalties, temporary expiatory penalties.[1]

One corrective measure consists in prohibiting the imposition of perpetual penalties. The adjective "perpetual" makes the penalty particularly onerous. The ecclesiastical legislator, while considering it necessary in the

1. Cf. A. BORRAS, *Les sanctions dans l'Église* (Paris 1990), p. 114.

canonical system, circumscribes it with special care. Thus, c. 1319 § 1 prohibits the constitution of perpetual expiatory penalties, even determinate penalties, by precept. To impose perpetual penalties, the judicial process is required (c. 1342 § 2), although it may also be used for non-perpetual penalties, including indeterminate penalties.

Another corrective measure is prohibiting superiors or judges from imposing *graviores* penalties. What these *graviores* penalties might be is not easy to say, but an important indication is found in the expression *praesertim censuras*. Censures (excommunication, interdict, suspension) are considered to be of major gravity. From what point of view this is true needs to be clarified because, if contemplated from the perspective that they cannot be imposed without prior canonical admonishment and if contumacy persists (cf. c. 1347), and knowing that they must be remitted when the offender ceases in contumacy (cf. c. 1358), it does not appear that censures are so grave in the long run. In practice, conversion of the offender produces cessation of contumacy. But it is precisely this bond they have with contumacy that, from another point of view, demonstrates their gravity. We are referring particularly to excommunication and interdict, which are the only two censures common to all the faithful (cf. cc. 1331 and 1332). These are penalties that are indivisible and in some way, although to different degrees, total, insofar as they deprive the faithful of the means to grace that the Church may have available, especially the sacraments. Members of the faithful who are punished remain outside ecclesial life; the Church no longer supports their road to faith and salvation. They are in a most grave situation for their eternal salvation. Those penalties are truly the *graviores* penalties. But among medicinal penalties, suspension is also included; it is a penalty applicable only to the clergy (cf. c. 1333 § 1). Suspension may be called a *gravior* penalty for its repercussion on the life of members of the faithful, who would be deprived of sacerdotal ministry. This is no doubt true for general suspension. On the other hand, it is doubtful that it is true if there is only partial suspension.

2. In another part of the Code, there is provision for certain prudence in applying medicinal penalties. Concerning *latae sententiae* penalties, c. 1318 recommends that they are not to be constituted "nisi forte in singularia quaedam delicta dolosa, quae vel graviori esse possint scandalo vel efficaciter puniri poenis ferendae sententiae non possint," and in conclusion says that "censuras autem ne constituat, nisi maxima cum moderatione et in sola delicta graviora." There is a reference to this canon by the norm in c. 1319 § 2, which limits the scope of the power to make penalties by penal precept. Those canons illuminate the meaning of c. 1349. When speaking of censure, excommunication is understood first and then interdict; the same was true in the previous Code. Therefore excommunication, interdict and total suspension are included among the *graviores* penalties. Partial suspension, although a censure, does not share the special effects of gravity with excommunication and interdict, that is, deprivation of the means to grace. A suspended cleric may, according to the

norm of the law, freely carry out his duties and rights as a member of the faithful in the Church.

Among expiatory penalties, penal deprivation of office (cf. cc. 1336 and 1396) should be added to the perpetual penalties that are excluded on principle.

3. The following paragraph that has the norm in c. 1349 should be emphasized: "neque aliud lex caveat." Precepts can never constitute indeterminate penalties. But not infrequently the law does provide for indeterminate penalties, without excluding medicinal penalties (cf., for example, cc. 1366, 1378 § 3, 1390 § 2). Those canons sometimes speak of censure in general and sometimes of excommunication. In some cases, indeterminate penalties,among other possibilities, were specified by the legislator himself. He even included expulsion from the clerical state, which is a perpetual penalty of such gravity that it may be established only by universal law (cf., for example, cc. 1364 § 2, 1367, 1370 § 1, 1394, 1395 §§ 1–2). We may then ask what exactly is the meaning of the clause "neque aliud lex caveat." If the law explicitly provides for the possibility, even if only facultatively, of an expiatory perpetual penalty or a censure, without excluding excommunication, can we continue saying that these are indeterminate penalties? It appears not.

Next, c. 1349 contains a second clause on imposing *graviores* penalties: "nisi casus gravitas id omnino postulet." Assessment of the gravity is left for the authority with jurisdiction.

The clause "neque aliud lex caveat" also refers to the prohibition against imposing perpetual penalties. On the other hand, the other clause ("nisi casus gravitas id omnino postulet") looks only to imposing *graviores* penalties. The gravity of the case can never legitimize imposing a perpetual penalty unless so established by law.

1350 **§ 1. In poenis clerico irrogandis semper cavendum est, ne iis quae ad honestam sustentationem sunt necessaria ipse careat, nisi agatur de dimissione e statu clericali.**

§ 2. Dimissio autem e statu clericali, qui propter poenam vere indigeat, Ordinarius meliore quo fieri potest modo providere curet.

§ 1. In imposing penalties on a cleric, except in the case of dismissal from the clerical state, care must always be taken that he does not lack what is necessary for his worthy support.

§ 2. If a person is truly in need because he has been dismissed from the clerical state, the Ordinary is to provide in the best way possible.

SOURCES: § 1: cc. 122, 1923 § 1, 2299 § 3
§ 2: c. 2303 § 2

CROSS REFERENCES: —

COMMENTARY

Velasio De Paolis, cs.

1. Canon law has always taken the support of the clergy into due consideration. *CIC*/1917 admitted the *privilegium competentiae* for the clergy (cf. c. 122), which gave them the privilege of never being deprived of what they needed for their own support. This is a right that current legal systems generally recognize for any citizen. Canonical penal law considers the problem only for the clergy because only the clergy, through sacred orders received in the Church, serve the Church under that sacred ordainment. The Church ensures the clergy their required support for the ministry that they fulfill (cf. cc. 281 and 1274). Strictly speaking, the clergy who do not fulfill their own office do not have a right to what is required for a respectable living. In addition, if a penalty was imposed or declared, c. 1331 § 2,5° deprives excommunicated persons of the fruits of an ecclesiastical dignity, office, function or pension. However, as long as the clerical state lasts, a member of the clergy should be given whatever is necessary to support him respectably. This does not mean that he should receive the same stipend or remuneration that he would have received if he had not been punished with a canonical penalty and if he had fulfilled his ministry in accordance with the norm in c. 281. What a respectable living consists of should be specified by particular laws, by the judge or the superior.

Having what is needed for a respectable living is a right that the canonical penal law system grants the clergy. However, c. 1350 § 1 states only the principle that the clergy should not lack what is necessary for a respectable living. The source is not necessarily the Church, because there no longer is any right to support derived from practicing a ministry according to the norm in c. 281.

2. In any case, this right ceases when a cleric has been expelled from the clerical state (§ 2). However, even in that case, the ordinary is required out of charity or equity to provide "in the best way possible" for an expelled cleric, provided that he is in a state of indigence because of the penalty. It must be emphasized that this is not a duty of justice, since there is no longer any relationship of justice between an ordinary and an expelled cleric, at least under sacred ordainment and sacerdotal ministry; the cleric has no right derived from the Church to respectable support. The best way to access the provision depends upon: first of all, the financial and economic situation of the diocese or community to which the expelled cleric belongs, but as well as his behavior, and other social circumstances. There is a charitable duty insofar as the cleric is truly in indigence; the state of indigence assumes that he has not even what is necessary for a respectable living. The state of indigence should be linked to the fact of having been expelled. If it derives from a lack of willingness to work, a lack of diligence, or a dissolute life, there is no question of any charitable duty. The economic situation of the community that has the charitable duty to support the cleric must also be taken into consideration.

"Ordinary" should be understood in the sense of c. 134 § 1, and that "clerics" also includes deacons. However, the legislation on the support of deacons is different from legislation on the support of presbyters (cf. c. 281 § 3).

Finally, in this matter, particular laws must also be considered.[1]

1. Cf. V. DE PAOLIS, "Il sostentamento del clero dal Concilio al Codice di diritto canonico," in R. LATOURELLE (Ed.), *Vaticano II. Bilancio e prospettive*, I, (Assisi 1987), pp. 571–595; idem, "Il sostentamento del clero nel Concilio e nel Codice," in *Quaderni di diritto ecclesiale* 1 (1989), pp. 35–56 (the entire issue is dedicated to the topic of financial support for the clergy).

1351 **Poena reum ubique tenet, etiam resoluto iure eius qui poenam constituit vel irrogavit, nisi aliud expresse caveatur.**

A penalty binds an offender everywhere, even when the one who established or imposed it has ceased from office, unless it is otherwise expressly provided.

SOURCES: c. 2226 § 4

CROSS REFERENCES: —

COMMENTARY

Velasio De Paolis, cs.

The principle of c. 1351 is substantially the same as § 4 of c. 2226 *CIC*/1917. It covers penalties after application.

The principle established in the canon is very old; it appears in documents that go back to the early centuries, which is evidence that excommunication or suspension *a divinis* imposed in one diocese held in the other dioceses. There was not, however, any norm that established a valid principle for all penalties. In the meantime, there was much discussion among the authors on the universal effectiveness for particular penalties.[1] For the first time, *CIC*/1917 established the principle of universal order.[2] The current Code confirms it.

The norm is a universal principle that concerns every penalty, whether medicinal and expiatory, regardless of the person by whom it was imposed, whether it was imposed under a universal law, a particular law or even under a precept, and regardless of the cause or the method.

The juridical reason behind the principle is evident for penalties established under a universal law, because the superior or judge who inflicts it, although operating in a certain scope or territory, has the support of a universal law. But it is also justified for penalties inflicted for violation of a particular personal law or a precept; the penalty in that case affects the offender as a person, regardless of his location. Justification is less evident, however, for a penalty applied and contracted for violation of a particular norm or territorial precept; there justification lies in the will of the

1. Cf. G. MICHIELS, *De delictis et poenis*, II. *De poenis in genere* (Paris 1961), pp. 276ff.
2. Ibid., pp. 281ff.

supreme legislator. But his will is not arbitrary. Its foundation lies in favoring the exercise of the power of governance and the discipline of the Church. It is easy to see how weakened the prestige of a superior and the discipline implied by a penalty would be with a simple change of residence or by leaving the territory where the penalty is in effect. This allows us to understand why the principle admits of exceptions: "nisi aliud expresse caveatur." From that perspective, one can grasp the norm in c. 1351.

A penalty is always related to an offense, with delinquent behavior imputable to the subject. After it has been imposed or declared, a penalty affects the subject as a person, "adheret ossibus et cuti:" it sticks to a person wherever he goes. Penalties follow the logic of a personal law. They do not cease even if the officeholder who established or imposed the penalty changes. However, it is not excluded that a superior may inflict a penalty for the duration of the offender's term of office, but that must be expressly stated. This is a general juridical principle for administrative acts of superiors (cf. cc. 33 § 2, 46, 81, 132 § 2, 142 § 1, 184 § 2, etc.). Indeed, although inflicted by a court, a penalty is executed by an ordinary; therefore, the act of execution, at least insofar as it is executive, is like a singular administrative act. It ceases with the extinction of a superior's power if the penalty was imposed under the formula *ad beneplacitum nostrum* (cf. c. 81).

Saying that a penalty obligates an offender to observe it means that the offender is obligated to hold to the effects that the penalty carries, even if no one knows that he has been penalized or if he is unknown, unless there are causes to suspend the penalty under the norms in cc. 1335, 1338 § 3 and 1352. The obligation to observe the penalty is none other than the obligation to obey the law or to obey legitimate authority that governs according to its competence and according to the norms of the law.

Canon 1393 provides for a facultative indeterminate penalty for anyone who violates the obligations deriving from a penalty.

1352 **§ 1. Si poena vetet recipere sacramenta vel sacramentalia, vetitum suspenditur, quamdiu reus in mortis periculo versatur.**

§ 2. Obligatio servandi poenam latae sententiae, quae neque declarata sit neque sit notoria in loco ubi delinquens versatur, eatenus ex toto vel ex parte suspenditur, quatenus reus eam servare nequeat sine periculo gravis scandali vel infamiae.

§ 1. If a penalty prohibits the reception of the sacraments or sacramentals, the prohibition is suspended for as long as the offender is in danger of death.

§ 2. The obligation of observing a *latae sententiae* penalty which has not been declared, and is not notorious in the place where the offender actually is, is suspended either in whole or in part to the extent that the offender cannot observe it without the danger of grave scandal or loss of good name.

SOURCES: § 1: c. 2252
§ 2: cc. 2232 § 1, 2290 § 1

CROSS REFERENCES: —

COMMENTARY

Velasio De Paolis, cs.

All legislation should provide norms for exceptional and extraordinary cases. This is particularly true for ecclesiastical law, which has as its specific objectives to establish regulations for the entire community, as well as to accompany the personal life of each member of the faithful. These objectives are derived from the proper end of the Church: the salvation of souls. The cases that legislation should provide for are the danger of death, the need to receive sacraments, in particular the sacraments of reconciliation and anointing of the sick, and danger of infamy and scandal.

This requirement finds a foundation in the specific configuration of medicinal penalties, such as excommunication and interdict (cf. cc. 1331–1332). Among the many effects carried by those penalties is the prohibition against receiving the sacraments, including reconciliation and anointing the sick.

The juridical instruments through which Church legislation operates to resolve those cases are authorizing remission of the penalty in the internal forum and suspending the penalty.

CIC/1917 provided for the possibility of absolution in the internal forum from all sins and all censures if a penitent were in danger of death (cf. c. 2252 *CIC*/1917). In urgent cases, when a penitent found it difficult to remain in a state of sin or if there was danger of infamy or scandal, the law gave his confessor the power to remit the penalty (cf. c. 2254 *CIC*/1917).

When penitents are in danger of death, the current Code provides the possibility of absolving them from any sins and censures, according to the norm in c. 976. Suspension of a penalty is distinguished from cessation of a penalty. Suspension of a penalty means suspension of its effects, or more precisely, suspension of the obligation of the penalty in all its effects or only in part, according to the provisions of the penal law and provided that the causes that the law established still exist. The obligation to observe the penalty returns in full force when the causes for suspension disappear.

The Code already spoke of suspending a penalty in cc. 1335 and 1338 § 3. There it considered the suspension of a penalty inflicted upon a cleric ministering to the good of the faithful. But a penalty may also be suspended for causes concerning any member of the faithful. These are causes that the Church cannot ignore or overlook. In *latae sententiae* penalties, there can be occult offenses and occult penalties, known only to the offender and a few other people. Obligating a member of the faithful to observe the penalty (c. 1351) in these circumstances may imply exposing him to loss of reputation or creating a scandalous situation.

A cause for suspension may occur more frequently in medicinal penalties than in expiatory penalties, especially since the medicinal penalties of excommunication and interdict prohibit receiving the sacraments, including sacramental absolution (cf. cc. 1331–1332). The Church cannot fail to take into account that a member of the faithful who is in danger of death has an urgent need for the help of the sacraments. It may also happen that the obligation to observe a penalty may create scandal or defame the offender himself.

The problem of suspending a penalty would have lost much importance without the last minute revision of the draft providing that excommunication and interdict may include a prohibition against the sacraments of reconciliation and anointing of the sick. A more rigorous separation between the external and internal forums would have given less reason to have recourse to suspending the penalty.[1]

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1. Cf. V. DE PAOLIS, "Le sanzioni nella Chiesa," in *Il diritto nel misterio della Chiesa*, vol. III, 2nd ed. (Rome 1992), p. 479; idem, "Totum ius poenale ad externum tantum forum limitatum est," in *Periodica* 65 (1976), pp. 297–346; idem, "Aspectus theologici et iuridici in systemate poenali canonico," in *Periodica* 75 (1986), pp. 221–254; idem, "Communio in novo codice iuris canonici," in *Periodica* 77 (1988), pp. 521–552; A. BORRAS, *L'excommunication dans le nouveau code de droit canonique. Essai de définition* (Paris 1987); idem, "Appartenence à l'Église, communion ecclesiale et excommunication," in *Nouvelle Revue Théologique* 110 (1988), pp. 801–824.

In cases of the risk of defamation, rather than have recourse to the suspension of a penalty, *CIC*/1917 preferred to give the confessor the power to remit the penalty in the internal forum, according to the norm in c. 2254. That canon described urgent cases from a double perspective: the difficulty of remaining in a state of grave sin and the difficulty of the danger of scandal or infamy. The new legislation has separated the two suppositions. Urgent cases are regulated in c. 1357 and are limited to the sole case of difficulty in remaining in a state of grave sin on the part of a penitent who wants to receive the sacrament of penitence. On the other hand, the supposition of infamy and scandal is regulated in c. 1352.

Canon 1352 is specifically aimed at providing for two cases. It provides not for remitting a penalty, but for suspending it; and not completely, but with regard to the demands to which it is trying to respond. In danger of death, the penalty is suspended during the time when the offender is in danger of death, if the penalty prohibits receiving the sacraments and sacramentals. On the other hand, if there is danger of losing reputation or danger of grave scandal, the penalty is suspended wholly or partially to the degree that there is this double danger. There is no such danger for *ferendae sententiae* penalties already inflicted, because they are assumed to be notorious. In that case it would be scandalous not to observe the penalty. The danger does not occur in all cases of *latae sententiae* penalties if they are declared or notorious in the place where the offender is located. Only in the case of occult, undeclared *latae sententiae* penalties is there actually danger of defamation and scandal.

It can also be useful to refer to c. 1071 § 1,5°. Among the effects of excommunication and interdict, cc. 1331–1332 include the prohibition against receiving the sacraments. If the norm were to be strictly interpreted, an excommunicated person or a person under interdict could not celebrate marriage. If it is a notorious censure, there must be recourse to the ordinary, who will say what has to be done; he could remit the penalty or suspend it. But for an occult censure, it would be suspended so as to protect a reputation.

Finally, among the penalties that the Code includes, none prohibits receiving the sacramentals. Such a penalty could only be an expiatory penalty established by particular law.

1353 **Appellatio vel recursus a sententiis iudicialibus vel a decretis, quae poenam quamlibet irrogent vel declarent, habent effectum suspensivum.**

An appeal or a recourse against judgements of a court or against decrees which impose or declare any penalty, has a suspensive effect.

SOURCES: cc. 2243, 2287

CROSS REFERENCES: —

COMMENTARY

Velasio De Paolis, cs.

The purpose of a penal procedure is to impose or declare a penalty (cf. cc. 1400 § 1,2°, 1341). This procedure may take place administratively or judicially (cf. cc. 1342, 1720 and 1721). Administratively, a superior imposes or declares the penalty by an administrative act called a "decree" (cf. c. 1720,3°); judicially, a judge imposes or declares the penalty in an act called a "judgment" or a "decision" (cf. c. 1726). There may be hierarchical recourse against a decree, which is a singular administrative act of a superior with administrative powers (cf. c. 48), brought before the superior immediately above and in accordance with the procedure especially provided by cc. 1732ff. Against a judgment, which is formally the concluding act in a judicial trial, an appeal may be brought before the next higher court (for the procedure to be followed both judicially and administratively, see commentary on tit. V of book VI).

For validity, a penalty imposed or declared by a judge's decision in court must be executed by the appropriate authority, in accordance with the norm in c. 1363.

An offender may always appeal a judgment, even if he has not been condemned because the judge did not deem it appropriate to apply the penalty (either because it was facultative (cf. c. 1343) or although it was perceptive, he felt it better to defer it, abstain from imposing it, or have recourse to conditional suspension (cf. c. 1344), or because after discovering attenuating circumstances, he preferred to abstain from any sanction (cf. c. 1345)). The promoter of justice appointed to the penal action (cf. c. 1721) may also appeal if he feels that reparation for damage or the reestablishment of justice has not been sufficiently ensured (cf. c. 1727 § 2). If it involves a public function, exercised for the public good, the promoter of justice must appeal if he believes the offender lacks sufficient amendment.

If there is a recourse or an appeal against an imposed or declared penalty, c. 1353 establishes that the penalty is to be suspended. Therefore, recourses and appeals have a suspensive effect; the penalty remains, but its effects are suspended until the complete itinerary of the recourse or the appeal is completed and the decree becomes final, or the judgment becomes *res iudicata* (adjudged matter).

Although some would have preferred that recourses and appeals have an *in devolutivo* effect instead of a suspensive effect, the legislator chose a milder approach, possibly because a penalty that is not yet final may not be considered juridically imposed or declared, or because the mere *in devolutivo* effect of sending it to a higher court does not meet the need for equity or fit canonical tradition.[1]

Compared to the preceding Code, this Code has enormously simplified the matter. *CIC*/1917 also considered the issue of doubt as to whether a penalty inflicted by a superior was or was not just (cf. c. 2219 § 2). In rather complicated wording, c. 2243 made distinctions that have not been retained in the current Code. In any case, only recourse *in devolutivo* was admitted against medicinal penalties imposed either by judgment or by decree, since to be freed from medicinal penalties it was sufficient that the offender desist from contumacy.

But the case of an appeal against a penal precept that establishes a penalty for transgressors and given by a judge or superior is different (cf. c. 2243 *CIC*/1917). Any appeal against this kind of precept should follow the channel provided by the canonical system in the case of a recourse, depending upon whether the precept was issued by a superior or by a judge during trial.

1. Cf. Comm. 16 (1984), p. 45.

TITULUS VI
De poenarum cessatione

TITLE VI
The Cessation of Penalties

INTRODUCTION

Alphonse Borras

A penal sanction is an ecclesial response to a gravely imputable offense; the sanction is designed to wipe away the consequences of the offender's act. A penalty, provided in a law or a precept, is applied when all other pastoral means have been exhausted. It is the general principle of penal canon law found in c. 1341, which concerns the *ferendae sententiae* imposition of penalties and the declaration of penalties incurred *latae sententiae*. There is a penal sanction when prior measures have not succeeded in repairing scandal, reestablishing justice and amending the offender. Those purposes are also inherent in *latae sententiae* penalties. In effect, c. 1318 states that those penalties are provided in cases of grave scandal and offenses that cannot be more effectively punished with *ferendae sententiae* penalties. *Intuitu claritatis*, comparing c. 1341 with c. 695 § 1, we prefer to speak of a double purpose: medicinal (or corrective)—the amendment of the offender; and expiatory (or reparative)—restoring justice and repairing scandal. Re-establishing justice and repairing scandal are two expiatory purposes linked to each other by the conjunction *et* ("and") in c. 695 § 1, which by using the conjunction *atque* ("and in addition") suggests the difference between the expiatory purposes and the medicinal purpose. All canonical penalties are both medicinal and expiatory, but medicinal penalties favor correction of the delinquent and expiatory penalties, reparation of the offense. Medicinal penalties are censures, the purpose of which is *primordially* and *specifically* medicinal or corrective, without excluding the goal of reparation of the offense (cf. c. 1347 § 2). The other penalties are expiatory, although not exclusively, in the sense that they principally tend or rather *directly* tend to repair the offense (cf. *CIC*/1917, c. 2286).

Application of the penalty, understood as *extrema ratio* (cf. c. 1341), places the offender in the situation of having to wipe away the consequences of his offensive act, which he will not be able to do other than by

working on his will and his freedom. Application of the penalty *obligates* the offender to amend himself and to repair the offense, in the sense that a bond is established, an obligation is created, *obligatio*, between the offense and the penal sanction. This is not a superfluous consideration since, after the constitutive and applicative phases, tit. VI (cc. 1345–1363) introduces us to the phase where penalties cease. A penalty *ceases* when the normative *relationship* or the penal *bond* between the sanction and the offense is dissolved; in other words, when the *obligation* to observe the penalty ceases for the offender. Cessation of the penalty frees the offender from his penal obligation, to which he was subject in his conscience "coram Deo et in facie Ecclesiae."

Cessation of a penalty occurs in different ways. A penalty may cease with the death of the offender, but it usually ceases from fulfilling or expiating the penalty if it had a determinate duration. In canon law, only expiatory penalties have a determinate duration. The Code does not consider the different ways of cessation; it treats only of remission (cc. 1345–1361) and prescription (cc. 1362–1363). In contrast to other ways of cessation, which are produced automatically, only remission depends upon a *positive* act by the competent authority.

Penalties may be remitted by absolution or by dispensation. Absolution is an act of justice that a superior has no right to deny. On the other hand, dispensation is an act of grace, a favor, the relaxation of a merely ecclesiastical law in a particular case (c. 85), which depends on the will of the superior. The old Code determined that censures were remitted by absolution, and expiatory penalties, then called vindictive, by dispensation (*CIC*/1917, c. 2236 § 1). That distinction was not abolished in the new Code, although tit. VI uses only the inclusive notion of remission. Outside of book VI, the legislator has used the notion of absolution to designate remission of censures (cf. cc. 508 § 1, 566 § 2 and 976).[1]

Dispensation from expiatory penalties implies that, in each *particular* case, the competent authority determines the opportuneness, or rather the need for, remission. The authority will assess whether the damage and scandal have been sufficiently repaired and consequently will decide if the penalty may be lifted before the given term, if it is a temporal expiatory penalty. On the other hand, he cannot dispense from a censure, the purpose of which is specifically medicinal. Remission depends mainly on the amendment of the offender or, to use the terms of cc. 1347 § 2 and 1358 § 1, "the purging of his contumacy," observed by the competent authority who, in strict justice, does not have the right to deny absolution.

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1. Contrary to the opinions of some canon lawyers, like G. FRANSEN, "Le nouveau Code de droit canonique. Présentation et réflexions," in *Revue Théologique de Louvain* 14 (1983), p. 287, and G. DI MATTIA, "Sostanza e forma nel nuovo diritto penale canonico," in *Il nuovo codice di diritto canonico. Novità, motivazione e significato* (Rome 1983), p. 428.

Just as in the case of providing for and applying penalties, remission belongs to the external forum and involves the internal forum. Provision for a penal sanction depends upon the power of governance, the legislative power for penal law, the executive power for penal precepts. The power of governance is exercised properly in the external forum, although sometimes only in the internal forum (c. 130). *CIC*/1917 said it more explicitly: "an act of the power of jurisdiction, whether ordinary or delegate, imposed for the external forum, is equally valid for the internal forum, but not the contrary" (c. 202 § 1). The application phase of penalties also depends upon the executive or judicial power of governance (cf. c. 1342). It belongs to the external forum, but also involves the internal forum. The same can be said for the remission phase. One must remember one of the directing principles of the *CIC*/1917 reform: "penalties are ... to be imposed and remitted in the external forum only."[2] Canons 1354–1356, which treat who is qualified to remit penalties, are written in the sense of that principle. But, the Code has not applied that principle in an absolute manner, since it provides for situations where a penalty may be remitted in the internal forum (c. 1357; cf. cc. 508, 566 § 2 and 976).

The Code has kept the institution of reserving penalties—more precisely, reserving the remission of *censures* (c. 1354 § 3). It has, however, restricted the number of different types (cf. *CIC*/1917, c. 2245 §§ 2–3) and has reduced to one the instances when a reservation or limitation may be established on absolution from censures (c. 1354 § 3).

Canons 1359–1361 contain other provisions on the remission of penalties. Canon 1359 considers remission in the case of accumulation of penalties (cf. c. 1346), and cc. 1360 and 1361 treat certain conditions or formalities required for remission.

Finally, the last two canons treat the prescription of criminal (c. 1362) and penal (1363) actions. During the drafting of the current Code, treating these questions in book VII was suggested, but that was not done, so the material is in its logical place in this title on the cessation of penalties.

Equally logically, the Code closes here the first part of book VI, which treats offenses and penalties in general and contains provisions pertaining to the different phases —constitutive, applicative and remissive—of the procedure that consists in *sanctioning* an act called an *offense* with a *penalty*.[3]

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2. *CIC*, Preface.

3. One can consult our study on the penal bond, that is to say, on the normative relationship between the delict and the punishment, as well as the explanation for our preference of the concept of *sanction*, most of all due to its rich semantic character: A. BORRAS, *Les sanctions dans l'Église. Commentaire des canons 1311–1399* (Paris 1990), pp. 45–50; 101–103.

1354 **§ 1. Praeter eos, qui in cann. 1355–1356 recensentur, omnes, qui a lege, quae poena munita est, dispensare possunt vel a praecepto poenam comminanti eximere, possunt etiam eam poenam remittere.**

§ 2. Potest praeterea lex vel praeceptum, poenam constituens, aliis quoque potestatem facere remittendi.

§ 3. Si Apostolica Sedes poenae remissionem sibi vel aliis reservaverit, reservatio stricte est interpretanda.

§ 1. Besides those who are enumerated in cann. 1355–1356, all who can dispense from a law which is supported by a penalty or exempt from a precept which threatens a penalty, can also remit the penalty itself.

§ 2. Moreover, a law or precept which establishes a penalty can also grant to others the power of remitting the penalty.

§ 3. If the Apostolic See has reserved the remission of a penalty to itself or to others, the reservation is to be strictly interpreted.

SOURCES: § 1: c. 2236 § 2; PIUS PP. XII, Alloc., 5 feb. 1955 (*AAS* 47 [1955] 80)
§ 2: c. 2236 § 1; PIUS PP. XII, Alloc., 5 feb. 1955 (*AAS* 47 [1955] 80)
§ 3: c. 2246 § 2; PIUS PP. XII, Alloc., 5 feb. 1955 (*AAS* 47 [1955] 80)

CROSS REFERENCES: cc. 1355, 1356, 1357

COMMENTARY

Alphonse Borras

1. Paragraph one of this canon states the general rule on who is qualified to remit a penalty in addition to those mentioned in cc. 1355 and 1356. The persons included in this paragraph may be grouped essentially in four categories:

a) Anyone with legislative power to establish penal laws (c. 1315 § 1), that is, the universal legislator and particular legislators (c. 135 § 2); and anyone who can dispense from those laws. This means, of course, each legislator with respect to his own laws, keeping in mind that the universal legislator may dispense from particular laws but particular

legislators do not have the power to dispense from universal penal laws (c. 87 § 1, cf. § 2).

b) Anyone with executive power in the external forum to issue a precept that bears a penalty (c. 1319 § 1).

c) Anyone qualified to execute a judgment or decree, that is, an ordinary (c. 134 § 1; cf. cc. 1341, 1348, etc.).

d) The superior of the person who imposed the penalty (cf. cc. 620, 622, etc.).

To this list, we must add the successors in office of the persons mentioned above. All those persons have *ordinary* power of remission, since that goes with the office by virtue of the law itself (c. 131 § 1).

In passing, we must mention that, if § 1 of c. 1354 refers to those with the power to dispense, it does so to indicate who is qualified to remit a penalty. It in no way indicates that remission of a penalty is always carried out by means of dispensation.[1]

2. Paragraph two treats the delegation of the power to remit a penalty. As an act of executive power, the remission of a penalty may be delegated to other persons. Delegation may have been already effected in universal law, in a particular law, or in the precept that establishes the penal sanction. However, it must not be forgotten that the power to remit may also be delegated by the authority with jurisdiction under the general provisions that regulate delegation and subdelegation of executive power (c. 137). Furthermore, since the authority with jurisdiction must watch over the good of souls, he must consider it a duty to delegate the remission of penalties in the external forum or—if applicable—in the internal forum, provided that the good of the faithful requires it. By virtue of § 2, the ordinary and the local ordinary that will be considered in cc. 1355 and 1356 enjoy ordinary executive power and may delegate to third parties. Finally, note that the Code puts its own provision into practice in c. 1357 § 2, insofar as it gives the power to remit penalties to persons who are neither authors of the law or precept nor the delegates provided by law or precept (cf. c. 1357 and cc. 508, 566 § 2, 976).

3. Paragraph three is concerned with the reservation of the remission of penalties. *CIC*/1917 defined the reservation of cases (*reservatio casuum*), that is, of sins and censures, as the transfer of certain cases to judgment by the superior, with the consequent limitation of the inferiors' power to absolve (cf. *CIC*/1917, cc. 893 and 2246–2247). In general, and speaking from the point of view of doctrine, reservation is the act by which a person in a superior position retains for himself a power that corresponds to or could correspond to a subordinate position. Such a definition

1. V. DE PAOLIS, *De sanctionibus in Ecclesia. Adnotationes in Codicem: Liber VI* (Rome 1986), pp. 96–97.

may be applied to different actual cases susceptible of being the object of a reservation, such as, for example, liturgical acts (cc. 767 § 1, 1169 § 2, 1207, etc.) or dispensations (cc. 14, 87 §§ 1–2, 686 § 1, 743, etc.). In the penal area, reservation affects the remission of penalties, and more specifically, of censures, at least usually (cc. 508 § 1, 566 § 2, 1355, 1357 § 3, 1362 § 1,1°, 1367, 1370 § 1, 1378 § 1, 1382, 1388 § 1).

Reservation is not a penalty, nor is it an aggravating element of a penalty. It simply *complicates* the road that must be followed to obtain remission. What is the justification for this complication? In *CIC*/1917, there are three reasons given for it: "the particular gravity of the delicts and the necessity for better ensuring ecclesiastical discipline and healing the conscience of the faithful" (c. 2246 § 1). Its first function—to emphasize the gravity of the offense—is part of the constitutive phase of penal sanctions; reservation here has a function of *general* prevention. In this stage, it may have a dissuasive role, since it is associated with particularly grave offenses (cf. cc. 1367, 1370 § 1, 1378 § 1, 1382, 1388 § 1). Its second function—to provide for ecclesiastical discipline—looks more to the public good of the Church. The third function—to care for the conscience of the faithful—looks to the good of the offender. The last two functions belong in the remissive phase and fulfill a *special* preventive function with regard to the individual. Canon 2246 § 1 of *CIC*/1917 retains doctrinal value: reservation of penalties, specifically of censures, complicates remission so as to ensure better repair of damage and scandal, specifically by means of exhortation or other expressions of pastoral care, or even by repression or imposing a penitence (c. 1358 § 2, cf. c. 1348). In that sense, reservation of penalties may be called a *disciplinary remedy.*[2]

Reservation of censures was nearly abolished during the reform of *CIC*/1917. The 1973 *Schema* kept it for absolution from excommunication when incurred for violence against the Pope's person,[3] and later it was kept for absolution from other types of excommunication (cc. 1367, 1370 § 1, 1378 § 1, 1382, 1388 § 1). The subject of reservation of censures, however, has been considerably simplified in the new Code.[4] Unfortunately, there is a deplorably ambiguous and unclear statement in § 3 of c. 1354; a better wording from the syntactic point of view would have been desirable.

What does § 3 say? From the syntactic point of view, the main clause is "the reservation is to be strictly interpreted." In juridical language, this clause is a *mandate*. It prescribes a strict interpretation of reservation

2. The designation is from G. MICHIELS, *De delictis et poenis. Commentarius Libri V Codicis Iuris Canonici*, III. *De poenis in specie. Canones 2314–2412* (Paris-Tournai-Rome-New York 1961), p. 59; A. BORRAS, *Les sanctions dans l'Église. Commentaire des canons 1311–1399* (Paris 1990), pp. 129–130.

3. *Comm.* 9 (1977), p. 306.

4. A. BORRAS, *Les sanctions*..., cit., p. 129.

(cf. *VI Reg. Iur.* XV). If, for example, excommunication is provided for a direct violation of the seal of confession, it does not affect a case of indirect violation, nor the violation of secrecy by an interpreter (cf. c. 1388). Up to this point, all is clear, but it is the subordinate clause that is difficult to understand: "If the Apostolic See has reserved the remission of a penalty to itself or to others." This clause states a hypothesis or possibility that, as subordinate to the principal clause (cf. the conjunction "if"), makes the mandate syntactically dependent upon the hypothesis "if." A reading of the canon gives one to understand that a strict interpretation is imposed only when there is a pontifical reservation, and that is how some canonists understand the statement. For example, F. Aznar writes, "In this case, reservation is to be strictly interpreted."[5] This reading is syntactically correct, but erroneous from the juridical point of view: a strict interpretation of reservation does not depend upon its pontifical *origin*. Reservation of penalties by its nature implies strict interpretation, for two reasons. First, in the case it affects, reservation restricts the free exercise of rights of persons who normally are qualified to remit penalties (cc. 1354 § 1, 1355–1356); thus, a strict interpretation is *de rigueur*, according to c. 18. Second, *CIC*/1917 prescribed a strict interpretation for reservation of censures (c. 2246 § 2); therefore, by virtue of c. 6 § 2, c. 1354 § 3 should be interpreted according to the old law. In conclusion, the legislator could have achieved greater clarity if he had written two different canons: one to prescribe strict interpretation and another to prescribe the exclusively pontifical origin of reservation of censures.

The novelty of § 3 is precisely that the Apostolic See has the power to reserve remission of penalties for itself or for others. Therefore, neither a particular legislator who establishes a penalty by law, nor an ordinary who provides for it by precept, nor the person who executes it—theoretically an ordinary, after a judgment or a decree—may reserve remission of penalties for themselves.[6]

5. F. AZNAR, commentary on c. 1354, in *Salamanca Com.* The French translation of the Code contains this erroneous reading: "*cette* réserve est d'interprétation stricte."

6. On the contrary, F. NIGRO thinks that the particular legislators can resort to the reservation of the penalty when it is a matter of rather grave delicts. His opinion—which appears in P.V. PINTO (Ed.), *Commento al Codice di Diritto Canonico* (Rome 1985), p. 792—seems to us unfounded.

1355 **§ 1. Poenam lege constitutam, si sit irrogata vel declarata, remittere possunt, dummodo non sit Apostolicae Sedi reservata:**

1° Ordinarius, qui iudicium ad poenam irrogandam vel declarandam promovit vel decreto eam per se vel per alium irrogavit vel declaravit;

2° Ordinarius loci in quo delinquens versatur, consulto tamen, nisi propter extraordinarias circumstantias impossibile sit, Ordinario, de quo sub n. 1.

§ 2. Poenam latae sententiae nondum declaratam lege constitutam, si Sedi Apostolicae non sit reservata, potest Ordinarius remittere suis subditis et iis qui in ipsius territorio versantur vel ibi deliquerint, et etiam quilibet Let.iscopus in actu tamen sacramentalis confessionis.

§ 1. Provided it is not reserved to the Apostolic See, a penalty which is established by law and has been imposed or declared, can be remitted by the following:

1° the Ordinary who initiated the judicial proceedings to impose or declare the penalty, or who by decree, either personally or through another, imposed or declared it;

2° the local Ordinary where the offender actually is, after consulting the Ordinary mentioned in n. 1, unless because of extraordinary circumstances this is impossible.

§ 2. Provided it is not reserved to the Apostolic See, a *latae sententiae* penalty established by law but not yet declared, can be remitted by the Ordinary in respect of his subjects and of those actually in his territory or of those who committed the offence in his territory. Moreover, any bishop can do this, but only in the course of sacramental confession.

SOURCES: § 1: cc. 2236 § 1, 2237 § 1, 2245, 2253 § 3
§ 2: c. 2237 § 2

CROSS REFERENCES: cc. 1354, 1357

COMMENTARY

Alphonse Borras

1. This canon deals with the remission of penalties established by a universal or particular law and not reserved to the Apostolic See. It determines which persons are qualified to remit the penalties, depending upon

the manner in which they were imposed. Penalties imposed *ferendae sententiae* or declared are distinguished from penalties simply incurred *latae sententiae*. These are the respective matters in each of the two paragraphs.

Paragraph one contains substantially the same prescriptions as c. 2245 § 2 of *CIC*/1917 on the censure *ab homine*; that censure was imposed as a particular precept or by judicial decision, although it might have been established by law (*CIC*/1917, c. 2217 § 1,3°). According to the old c. 2245 § 2, an *ab homine* censure was reserved for someone who had inflicted it or had handed down the decision, to his qualified superior, his successor or his delegate. Certainly, *CIC*, in § 1,1° of this canon, includes attribution of remission of a penalty to the person who inflicted or declared it, himself or through another, but in that case it speaks of an *ordinary*, thus designating all persons who may be so called (c. 134 § 1).

Number 2 of this paragraph, however, amplifies the old provision; it adds that the *ordinary of the place* (c. 134 § 2) where the offender actually is may also remit *ferendae sententiae* or *latae sententiae* penalties that have been declared, established by law and not reserved to the Apostolic See. Thus, the legislator preferred the *favor rei*, mindful of the mobility of our contemporaries. The ordinary of the place where the offender actually is, should, however, consult the ordinary mentioned in no. 1°. However, consultation is not prescribed *ad validitatem* for two reasons. Above all, the legislator does not sanction it expressly as a requisite for validity (cf. c. 10). In addition, the legislator himself goes on to establish a clause of exception, making consultation not obligatory in extraordinary circumstances: "ad impossibile nemo tenetur." The consultation was established to avoid possible abuses,[1] and it is justified by the respect and sensitivity due to the authority who initiated the judicial proceedings or who executed the judgment. It is also justified by the need to know the reasons for imposing or declaring the penalty, so as to make the best possible assessment of the advisability and opportuneness of remission.[2]

2. Paragraph two deals with *latae sententiae* penalties established by a law, which are neither declared nor reserved. It includes most of what was prescribed in c. 2237 of the earlier Code. Attribution to the ordinary of the power to remit leads to no difficulties of comprehension whatsoever; it must simply be pointed out that anyone who has committed an offense in the territory is treated here like the ordinary's subjects proper.

On the other hand, there is a novelty: the attribution to any diocesan or titular bishop (*quilibet Episcopus*) (cf. c. 376) of the power to remit these penalties. Canon 1307 of the 1980 *Schema* did not yet mention this; it was introduced later.

1. *Comm.* 9 (1977), p. 169.
2. This is the opinion of J. ARIAS, commentary on c. 1355, in *Pamplona Com.*

According to the second paragraph, each bishop may remit these penalties during sacramental confession ("in actu sacramentalis confessionis"). That expression appears only twice in the Code: here and in c. 1079 § 3 (cf. *CIC*/1917, c. 1044). It is a new expression in the matter of remission of penal sanctions. Remission during sacramental confession takes place in the internal forum.

We do not share the opinion of J. Arias. To him, this remission is a "public juridical act carried out within the sacramental framework, but in the external forum—proper to the law—with an occult character."[3] Apart from one reason from theology of law that underlies his opinion, this author seems to consider the sacrament and the law as two *essentially* different realities. There is another reason, which concerns the exegesis of c. 2251 of the prior Code. Arias bases his opinion on the old canon. However, that canon did not say that in certain circumstances absolution is *valid* for the external forum, but that absolution in the internal form may be *proved* in the external forum. In addition, the canon said that, to eliminate the possibility of scandal,a person absolved in the external forum may behave as if absolved even in acts in the external forum. In other terms, the author of an offense is not absolved in the external forum, but behaves *as if* he were, at least in acts in the external forum. The final section of c. 2251 provided that a superior could require that a censure be observed in the external forum while it had not been absolved in the external forum, *except* if granting absolution (*in the internal forum*) had been proved. The proof in question here is none other than proof that absolution was granted in the *internal forum*. This in no way corresponds to absolution in the external forum. If that were the case, the previous legislator would not have added the clause "as long as it has not been absolved in the external forum." That clause clearly shows that absolution has no value in the external forum. Specifically, if absolution in the internal forum is proved, the superior will act "as if" and will not impose observance of the censure. The reference to c. 2251, therefore, does not enable us to justify any effect in the external forum of a remission granted during the act of a sacramental confession. That takes place in the internal forum. However, we can point out that the power recognized in any bishop in § 2 is broader than the power attributed to the confessor in cc. 976 and 1357.

3. Cf. ibid.

1356 **§ 1. Poenam ferendae vel latae sententiae constitutam praecepto quod non sit ab Apostolica Sede latum, remittere possunt:**
1° Ordinarius loci, in quo delinquens versatur;
2° si poena sit irrogata vel declarata, etiam Ordinarius qui iudicium ad poenam irrogandam vel declarandam promovit vel decreto eam per se vel per alium irrogavit vel declaravit.

§ 2. Antequam remissio fiat, consulendus est, nisi propter extraordinarias circumstantias impossibile sit, praecepti auctor.

§ 1. A *ferendae* or a *latae sententiae* penalty established in a precept not issued by the Apostolic See, can be remitted by the following:
1° the local Ordinary where the offender actually is;
2° if the penalty has been imposed or declared, the Ordinary who initiated the judicial proceedings to impose or declare the penalty, or who by a decree, either personally or through another, imposed or declared it.

§ 2. Before the remission is granted, the author of the precept is to be consulted, unless because of extraordinary circumstances this is impossible.

SOURCES: § 1: cc. 2236 § 1, 2245 § 2, 2253,2° et 3°

CROSS REFERENCES: cc. 1354, 1355

COMMENTARY

Alphonse Borras

1. This canon deals with the remission of penalties under a particular precept that was not issued by the Apostolic See. According to c. 1354 § 1, the author of a precept that threatens a penalty, since he may exempt from it, may also remit the penalty (cf. *CIC*/1917, c. 2236 § 2). Under § 1,1°, the local ordinary where the offender actually is may remit a *ferendae* or *latae sententiae* penalty established by a precept that was not issued by the Apostolic See. Number 2° of this paragraph establishes that the ordinary who initiated the judicial or administrative proceedings to impose or declare the penalty *also* may remit a declared *ferendae sententiae* or *latae sententiae* penalty that was provided by a precept, unless the precept came from the Holy See. The Code did not include c. 2235 § 3

CIC/1917, which prohibited the judge who applied the penalty established by a superior from remitting it after application. This is obvious, since a judge, as such, has no power over the law. The judge *says* what the law is; once he has judged, his power ceases.

2. Paragraph two provides that the local ordinary, or the ordinary mentioned in § 1, should consult the author of the precept. This is a question of respect, but also of information about the reasons for the precept and the penalty, and discernment of the appropriateness and opportuneness of the remission. There is no consultation *ad validitatem* here (see the reasons in commentary on c. 1355 § 1,2°).[1]

3. *Intuitu claritatis*, the provisions that regulate remission of penalties in the external forum under cc. 1354–1356 may be recapitulated here, and the persons qualified to do so distinguished one from another.

— First, the Apostolic See, who reserves all penalties established by law, if the law expressly provides for pontifical reservation, and all penalties established by precept from the Holy See (c. 1354 § 3; cf. c. 1356 § 1).

— Next, the local ordinary. In his own territory, he may remit all penalties established by law or precept, whether imposed *ferendae sententiae*, *latae sententiae*, or declared (cf. c. 1355 § 1,2° and § 2, for the bishop; c. 1356 § 1,1°). Outside his own territory, he may remit penalties only for his own subjects (cf. c. 136). Before remitting the penalty of anyone who is not one of his subjects but who is in his territory, the local ordinary should consult with the ordinary "who initiated the judicial proceedings to impose or declare the penalty, or who by a decree, either personally or through another, imposed or declared it" (cf. c. 1355 § 1,2°), "unless because of extraordinary circumstances this is impossible," in the case of a penalty set by law (*ibid.*). In addition, for remitting a penalty provided in a precept, the author of the precept must be consulted, unless it is impossible to do so because of extraordinary circumstances (c. 1356 § 2).

— Finally, the ordinary who is qualified to remit penalties in the external forum, if he is the one who "initiated the judicial proceedings to impose or declare the penalty, or who by a decree, either personally or through another, imposed or declared it" (cf. cc. 1355 § 1,1°; 1356 § 1,2°). Furthermore, he may also remit *latae sententiae* penalties established by law but not declared, for his own subjects and for those who happen to be in his territory or who committed the offense therein (cf. c. 1355 § 2).

1. For an opposing viewpoint, cf. F. Aznar, commentary on c. 1355 § 2, in *Salamanca Com*, referring to c. 127 § 2,2°.

1357 **§ 1. Firmis praescriptis cann. 508 et 976, censuram latae sententiae excommunicationis vel interdicti non declaratam confessarius remittere potest in foro interno sacramentali, si paenitenti durum sit in statu gravis peccati permanere per tempus necessarium ut Superior competens provideat.**

§ 2. In remissione concedenda confessarius paenitenti onus iniungat recurrendi intra mensem sub poena reincidentiae ad Superiorem competentem vel ad sacerdotem facultate praeditum, et standi huius mandatis; interim imponat congruam paenitentiam et, quatenus urgeat, scandali et damni reparationem; recursus autem fieri potest etiam per confessarium, sine nominis mentione.

§ 3. Eodem onere recurrendi tenentur, postquam convaluerint, ii quibus ad normam can. 976 remissa est censura irrogata vel declarata vel Sedi Apostolicae reservata.

§ 1. Without prejudice to the provisions of cann. 508 and 976, a confessor can in the internal sacramental forum remit a *latae sententiae* censure of excommunication or interdict which has not been declared, if it is difficult for the penitent to remain in a state of grave sin for the time necessary for the competent Superior to provide.

§ 2. In granting the remission, the confessor is to impose upon the penitent, under pain of again incurring the censure, the obligation to have recourse within one month to the competent Superior or to a priest having the requisite faculty, and to abide by his instructions. In the meantime, the confessor is to impose an appropriate penance and, to the extent demanded, to require reparation of scandal and damage. The recourse, however, may be made even through the confessor, without mention of name.

§ 3. The same duty of recourse, when they have recovered, binds those who in accordance with can. 976 have had remitted an imposed or declared censure or one reserved to the Apostolic See.

SOURCES: § 1: c. 2254 § 1
§ 2: c. 2254 §§ 1 et 3; CodCom Resp. VIII, 12 nov. 1922 (*AAS* 14 [1922] 663)
§ 3: c. 2252; CodCom Resp. VIII, 12 nov. 1922 (*AAS* 14 [1922] 663)

CROSS REFERENCES: cc. 508 § 1, 566 § 2, 976, 1355 § 2

COMMENTARY

Alphonse Borras

1. Heir to a centuries-old practice, the legislator did not want to omit the possibility of remitting a penalty in the internal forum. The Code even includes different cases for which specific solutions are provided. They are the provisions in cc. 508, 566 § 2, 976, 1357 and c. 1355 § 2. In contrast to the other canons cited, c. 1355 § 2 refers to both the remission of expiatory penalties and *latae sententiae* censures established by law, not declared and not reserved to the Holy See. Every bishop may remit those penalties in the act of sacramental confession. Any bishop, therefore, *ipso iure* enjoys broad powers of remission in the internal forum. On the other hand, c. 1357 and the canons referenced therein affect only censures and not expiatory penalties.

2. Paragraph one of this canon attributes to a confessor (that is, any minister, either presbyter or bishop, approved to hear confessions (cf. *CIC*/1917, c. 2254))—the power to remit in the internal sacramental forum a *latae sententiae* censure of excommunication or interdict that was not declared. This provision is an exception to the rule that prescribes absolution in the external forum of these censures before granting sacramental absolution. A confessor is qualified to remit those censures in the internal sacramental forum on the condition that it would be difficult for the penitent to remain in a state of grave sin during the time required for the superior of jurisdiction to provide remission in the external forum. The Code has retained only one of the three urgent cases provided for in c. 2254 § 1 of *CIC*/1917. Cases of danger of grave scandal or risk of the offender's infamy are no longer included.

3. However, the legislator has not passed over certain cases, such as those cited in the introductory section of § 1 of this canon. Canon 508 § 1 establishes that the canon penitentiary has the ordinary faculty, which he cannot delegate to others, to absolve from *latae sententiae* excommunication and interdict which have not been declared and are not reserved.[1] Canon 1357 § 1 is broader: a confessor may absolve from *reserved* censures. In addition, the legislator includes the faculty of hospital, prison and ship chaplains to remit *latae sententiae* censures that are neither reserved nor declared. This is the new provision of c. 566 § 2, which, curiously, is not mentioned in the introductory section.[2] On the other hand,

1. The omission of the express indication of § 1 in the reference to c. 508 stems from the fact that in the *Schema* of 1980 the corresponding canon (c. 428) had just one paragraph. Only after the *Schema* of 1980 was the disposition of § 2 added, and no one remembered to adjust c. 1357 with that addition.

2. Cf. our commentary on c. 566 § 2 in A. BORRAS, *Les sanctions dans l'Église. Commentaire des canons 1311–1399* (Paris 1990), pp. 139–140.

c. 1357 § 1 expressly remits to c. 976, which refers to the valid and licit remission of all censures, including reserved censures (and of all sins), if the penitent is in danger of death, by any priest, even if he does not enjoy the faculty of hearing confessions and although an approved priest is present (cf. *CIC*/1917, c. 882). These provisions on remission in the internal forum (cc. 508 § 1, 566 § 2 and 976) enable us to say that, even though two urgent cases have been eliminated, the Code allows broad latitude when it is a matter of caring for the *salus animarum* in particular instances. However, to put any of the directive principles in the reform of *CIC*/1917 into practice—"penalties ... must be imposed and remitted only in the external forum"—the legislator should limit remission in the internal forum somewhat, even though only slightly.[3]

4. Two more comments are needed about this first paragraph. Where *CIC*/1917 dealt with the absolution of *latae sententiae* censures (c. 2254), the Code deals only with absolution from excommunication and interdict, and excludes suspension. From this point of view, the current legislation is more consistent than the previous legislation. The restriction is easily understandable, because suspension does not carry with it any prohibition from receiving the sacraments, in particular the sacrament of penitence. The second aspect that we would like to emphasize refers to the fact that c. 1357 § 1 deals only with excommunication and interdict in persons who incurred it *latae sententiae*, in contrast to *CIC*/1917, which also included declared censures. In the current Code, exclusion of *declared* excommunication and interdict is consistent with the principle of remission of penalties in the external forum. Declaration of a *latae sententiae*[4] penalty has the special effect of obligating its observance in the external forum.[5] Therefore, retaining remission of declared penalties in the internal forum would have implied a dislocation of the principle of remission in the external forum, a guiding principle in the preparation of the new Code.

Incidentally, this canon did not appear in the 1973 *Schema*, which substantially modified the concepts of excommunication and interdict. Traditionally, these censures included among their effect a prohibition from receiving all the sacraments, *nullo excluso*. In allowing a person under excommunication or interdict to receive the sacraments of penance and anointing of the sick, it was no longer necessary to include the urgent cases of c. 2254 *CIC*/1917. Such cases were no longer justified for the remission of censures, since none of those penalties any longer had the

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3. *CIC*, Preface; cf. V. DE PAOLIS, *De sanctionibus in Ecclesia. Adnotationes in Codicem: Liber VI* (Rome 1986), pp. 102; idem, "Totum ius poenale ad externum tantum forum limitatum est," in *Periodica* 65 (1976), pp. 297–315.

4. The special penal Law of the Code (book VI, part II, cc. 1364–1398) did not foresee expiatory punishments *latae sententiae* for any of the typified crimes. In the *CIC*, the *latae sententiae* application was foreseen only for censures, which is why only these can be declared.

5. A. BORRAS, *Les sanctions...*, cit., pp. 69, 70, 119.

effect of exclusion from the sacrament of penance. For information only, we point out that the 1973 *Schema* tried to separate the external forum and the internal forum in this way. The proposal was judged excessively radical and was rejected.[6] For that reason, it was necessary to consider again the hypothesis of urgent cases, so the current canon was formulated.

5. Paragraph two imposes four obligations on a confessor with respect to a penitent, which in turn entail obligations for the penitent. The confessor's first duty is to impose upon the penitent the obligation of recourse (*onus recurrendi*) within one month to the superior of jurisdiction or to a priest having the faculty to remit censures in the external forum (cc. 1354–1356; cf. c. 508 § 1). The current Code no longer includes the possibility of a morally impossible recourse, which c. 2254 § 3 *CIC*/1917 provided in the *exceptional* case that a confessor could grant absolution without imposing the obligation for recourse. It further provided that, as a consequence, the confessor should carry out what the competent authority should have done normally: impose an appropriate penance and satisfaction for the censure. That is what the Code provided for cases of effective recourse. By not *expressly* dealing with the impossibility of recourse, the legislator has much better honored the principle that penal law belongs to the external forum. In addition, there are reasons to believe that the possibility of impossible recourse was purposely not included because the obligation to have recourse is an ecclesiastical law, and ecclesiastical laws do not obligate with grave inconvenience external to the law as such.[7]

The second obligation of a confessor is to impose upon a penitent the duty to obey the instructions of whoever is going to grant absolution in the external forum: "onus standi huius mandati" (*CIC*/1917, c. 2254 § 1, *in fine*).

The third obligation of a confessor is a new one, previously prescribed for cases of morally impossible recourse (*CIC*/1917, c. 2254 § 3). It imposes an appropriate penance on the penitent—*congrua paenitentia*—that is, to perform some work of religion, piety or charity (cf. c. 1340 § 1). The penance will in principle be light, since it follows remission in the internal forum granted on the basis of the offender's amendment (cf. c. 1358), and it should be a substitute for the penalty, not an augmentation of it (c. 1312 § 3), since the medicinal purpose has been achieved.

The fourth obligation depends upon the circumstances, *quatenus urgeat*, to the degree that there is urgency. It consists in imposing, if the case requires it, repair of the scandal and damage caused. *CIC*/1917 spoke

6. *Comm.* 9 (1977), pp. 149, 322.

7. V. DE PAOLIS, "Il Libro VI: le sanzioni nella Chiesa," in *La Scuola Cattolica* 112 (1984), pp. 371–372; A. BORRAS, *Les sanctions...*, cit., pp. 144–145.

of "satisfaction for the censure," but in cases of moral impossibility of recourse (c. 2254 § 3). Currently, repair is prescribed, if necessary, at the time of remission in the internal forum, prior to remission in the external forum. Canon 1357 § 1 supposes that the offender has repented and that the specifically medicinal purpose of the censure has been achieved. It remains to verify the achievement of the expiatory or reparative purpose that is required *conjointly* (c. 1358 § 1; cf. c. 1347 § 2). This verification is for the confessor qualified to absolve from the censure; if reparation for the damage has not been accomplished by the time of absolution, a serious promise to do so should be exacted from the penitent (c. 1347 § 2), and he should be ordered to make the reparation imposed upon him (c. 1357 § 2).

6. There are four correlative obligations for a penitent. The first is to have recourse, himself or through a confessor, to the authority of jurisdiction in the external forum. The recourse obligation is imposed upon him *sub poena reincidentiae*, that is, under pain of relapsing into censure. This is a condition that suspends the effect of the censure; a censure remitted to the internal forum is suspended in its effects and is not remitted in the external forum, except by a superior qualified for that forum.[8] In addition, it is consistent with one of the guiding principles of the reform of the old Code: the limitation of penal law to the external forum, although with care not to establish a radical *caesura* with the internal forum.[9] Recourse should be had within one month.

The penitent's other three obligations are to obey the instructions from the superior of jurisdiction in the external forum, to fulfill the penance imposed by the confessor and, if applicable, to repair the scandal and damage. A penitent is subject to these obligations, but not under pain of relapsing into his censure.

8. Regarding the issue of distinguishing whether the condition has the effect of suspension or resolution, A. BORRAS, *L'excommunication dans le nouveau code de droit canonique. Essai de définition* (Paris 1987), p. 130, no. 71; idem, *Les sanctions...*, cit., p. 143, no. 40.

9. Cf. *Comm.* 1 (1969), p. 79; 2 (1970), p. 101; 7 (1975), p. 95.

1358 **§ 1. Remissio censurae dari non potest nisi delinquenti qui a contumacia, ad normam can. 1347 § 2, recesserit; recedenti autem denegari nequit.**

§ 2. Qui censuram remittit, potest ad normam can. 1348 providere vel etiam paenitentiam imponere.

§ 1. The remission of a censure cannot be granted except to an offender whose contempt has been purged in accordance with can. 1347 § 2. However, once the contempt has been purged, the remission cannot be refused.

§ 2. The one who remits a censure can make provision in accordance with can. 1348, and can also impose a penance.

SOURCES: c. 2248 § 2; PIUS PP. XII, Alloc., 5 feb. 1955 (*AAS* 47 [1955] 73)

CROSS REFERENCES: cc. 1347 § 2, 1348

COMMENTARY

Alphonse Borras

1. *This canon deals with the conditions required for remission of a* censure, or to put it another way, for *absolution* from a censure. Remission of expiatory penalties is performed through an act of grace by the authority with jurisdiction, called a dispensation (c. 85). Paragraph one covers c. 2248 § 2 of *CIC*/1917, which expressly spoke of *absolution*: "absolution cannot be refused once the author of the delict has purged the contempt in accordance with c. 2242 § 3." The expression "purge the contempt" is studied in the commentary on c. 1347 § 2, where, as in *CIC*/1917, the legislator has deemed it opportune to give a definition of what he means by the expression. Anyone who incurs a censure *latae sententiae*, or who is inflicted *ferendae sententiae*, is considered "to have purged the contempt" when he or she has repented and *also* made reparation for the damage and scandal, or at least seriously promised to do so. The expression "purge the contempt" does not mean just to cease the attitude of contumacy or disobedience, and the additional malice that has accompanied the offense. According to c. 1347 § 2, it implies effective repentance for the offense and appropriate reparation for damage and scandal. A careful exegesis of the canon cannot fail to note the scope of the adverb *praeterea*, which necessarily implies reparation.[1]

1. For an in depth study of c. 1347 § 2, we refer to our work: A. BORRAS, *L'excommunication dans le nouveau code de droit canonique. Essai de définition* (Paris 1987), pp. 286–289.

A censure, therefore, cannot be remitted without both conditions: first, that the medicinal purpose, amendment of the offender, has been achieved, and second, that the damage and scandal have been *repaired*, or at least a serious promise has been made. Effective achievement of the second condition, achieving the expiatory purpose, is not required, only the promise to make reparation. It is clear, however, that the dual purpose present in the application of penalties (c. 1347 § 1; cf. c. 1341) is also present in the remission of penalties. After the dual purpose has been achieved, the censure must be remitted, as expressly stated in c. 1358 § 1: the remission "cannot be refused."

If the dual condition is verified—amendment and reparation—the offender has a right to absolution from the censure, and the authority with jurisdiction has the duty to grant it. This is *strictly* a question of *justice*, for the cause of the censure, formal or virtual contumacy, no longer exists. It is, therefore, a result of the *nature* of censures, which contumacy formally, or at least virtually, implies. After contumacy disappears, there is no longer any reason for a censure. In any case, it is not the result of a provision by the legislator in a positivist or voluntarist sense. Purging the contempt is a *condition* of remission, not a cause. Strictly speaking, the cause lies in the authority with jurisdiction to remit (cc. 1354–1356; cf. c. 1357).

2. It is understandable why the remission of a censure cannot be carried out by means of a dispensation. A dispensation is an act of grace that relaxes a merely ecclesiastical law in a particular case (c. 85). As such, a dispensation depends *above all* on the will of the authority of jurisdiction, not essentially on the amendment of the offender together with reparation for damage and scandal (c. 1347 § 2). We should, therefore, retain the distinction between remission by absolution and remission by dispensation, a distinction that applies to both censures and expiatory penalties. Nevertheless, it must not be rigidly understood, as if remission of an expiatory penalty were a *pure act* of grace, unrelated to other considerations pursued in achieving the expiatory purpose of the penalty. In this case, too, the authority of jurisdiction should assess whether the specific purpose of the expiatory penalty (if applicable, reparation for damage and scandal) has been achieved. The "just and reasonable cause" of the dispensation is precisely the accomplishment of that purpose (c. 90). When we speak of an act of grace for dispensation from an expiatory penalty, it is important above all to compare that type of remission with absolution from a censure, which is something due to the offender under the terms of c. 1358 § 1. However, we may speak of an act of justice in remitting from both types of penalties, even though different purposes are sought, if in both cases compliance with the requirements established by the law is required. Under those conditions, remission of the penalty does not depend upon the judgment of the superior.[2]

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2. Essentially that expressed by F. NIGRO, in P.V. PINTO (Ed.), *Commento al Codice di Diritto Canonico* (Rome 1985), p. 796.

3. Paragraph two allows the person who remits a censure to adopt the measures provided in c. 1348 or to impose a penance. The legislator has not retained the possibility of inflicting a *suitable vindictive penalty*, as provided in c. 2248 § 2 of *CIC*/1917. An expiatory penalty *directly* pursues expiation for the offense (cf. *CIC*/1917, c. 2286), but achieving this purpose has justly been the object of a serious promise (cf. *CIC*, c. 1347 § 2). Thus, there is no longer any justification for an expiatory penalty.

The measures included in c. 1348 are appropriate admonishments and other means of pastoral care, or, if applicable, penal remedies. The mention of penances, if applicable, to substitute for a penalty (c. 1312 § 3) broadens the range of measures available "to provide for the person's welfare or the common good" (c. 1348). Canon 1358 § 2 may be applicable if, for example, the offender has repented but has not yet repaired the scandal and damage caused by his offense.

1359 Si quis pluribus poenis detineatur, remissio valet tantummodo pro poenis in ipsa expressis; generalis autem remissio omnes aufert poenas, iis exceptis quas in petitione reus mala fide reticuerit.

If one is bound by a number of penalties, a remission is valid only for those penalties expressed in it. A general remission, however, removes all penalties except those which in the petition have been concealed in bad faith.

SOURCES: c. 2249 § 2

CROSS REFERENCES: c. 1346

COMMENTARY

Alphonse Borras

1. This canon covers remission of penalties in cases where a person has incurred more than one. In other words, this canon considers remission when there is *material* accumulation of penalties. For *latae sententiae* penalties, accumulation is automatic; on the other hand, for *ferendae sententiae* penalties, canonical equity tends not to proceed to rigorous *material* accumulation. Canon 1346 honors the resolve to be merciful to the offender. Canon 1359 deals with the substance of the prescription in *CIC*/1917 (c. 2249 § 2) and assumes that a *partial* remission is granted, as *CIC*/1917 stated when dealing with the accumulation of censures, "If one is bound by a number of penalties, one can be absolved of one of them without being absolved of any of the rest" (*CIC*/1917 c. 2249 § 1).

Doctrine distinguishes between absolution from censures and absolution from sins. Absolution from sin is always total; a grave sin cannot be pardoned without pardoning other sins. Sacramental absolution reconciles with God and the Church, with total re-establishment in the state of grace. On the other hand, absolution from censures *may* be partial. An offender may be absolved from one censure and not from another. Furthermore, a suspended person (c. 1333) may even be absolved sacramentally and, therefore, will be in the state of grace, although still under censure.[1]

In the case of accumulation of penalties, remission is valid only for the penalties expressly mentioned. Depending on whether all or only some penalties are mentioned, remission will be total or partial. In other

1. Cf. E. JOMBART, "Des délits et des peines," in R. NAZ (Ed.), *Traité de droit canonique*, t. 4, 2nd ed. (Paris 1954), pp. 637–638.

words, remission of accumulated penalties will not be *general* or *total* unless *all* penalties are expressly mentioned. This first principle in the canon is addressed to the authority with jurisdiction to remit.

2. This canon contains a second principle addressed instead to the person who has incurred several penalties: penalties concealed in bad faith in a petition will not be remitted. In other words, remission cannot claim to be general or total if it does not include all penalties mentioned in the petition and penalties forgotten in good faith. The legislator here shows his *favor rei*.

If any of the accumulated penalties is reserved to the Apostolic See, only the Apostolic See may grant, if applicable, a general remission (cf. c. 1354 § 3).

1360 **Poenae remissio metu gravi extorta irrita est.**

The remission of a penalty extorted by grave fear is invalid.

SOURCES: c. 2238

CROSS REFERENCES: c. 125 § 2

COMMENTARY

Alphonse Borras

This canon is one of the numerous exceptions to the rule stated in c. 125 § 2, which states that, in general, a juridical act performed out of grave fear is valid.[1] Canon 1360 is an invalidating law (c. 10); it expressly prescribes that an act is invalid, as did c. 2238 of *CIC*/1917. However, in contrast, the current law no longer mentions physical violence. Because of the grave fear it causes, physical violence *a fortiori* invalidates remission of a penalty. Anyone forcing remission of his penalty by causing grave fear (with violence) in the competent superior cannot be considered sincerely repentant, nor can he be deemed to have repaired the scandal and damage caused by his offense. Finally, note that, in contrast to c. 125 § 2, this canon does not expressly require that the grave fear have been unjustly caused. In addition, c. 2238 of *CIC*/1917 also did not make that requirement. In the current Code, the legislator appears to no longer require unjustly caused fear (cf. c. 1103). This is a question of common sense, for it would seem there are no situations when grave fear that is *just* could be caused.

1. The other exceptions to c. 125 § 2 are in cc. 172 § 1, 188, 643 § 1,4°, 656,4°, 1098, 1103, 1200 § 2, 1323,4°, 1324 § 1,5°, 1345, 1538, 1620,3°.

1361 **§ 1. Remissio dari potest etiam absenti vel sub condicione.**

§ 2. Remissio in foro externo detur scripto, nisi gravis causa aliud suadeat.

§ 3. Caveatur ne remissionis petitio vel ipsa remissio divulgetur, nisi quatenus id vel utile sit ad rei famam tuendam vel necessarium ad scandalum reparandum.

§ 1. A remission can be granted even to a person who is not present, or conditionally.

§ 2. A remission in the external forum is to be granted in writing, unless a grave reason suggests otherwise.

§ 3. Care is to be taken that the petition for remission or the remission itself is not made public, except in so far as this would either be useful for the protection of the good name of the offender, or be necessary to repair scandal.

SOURCES: § 1: c. 2239 § 1
§ 2: c. 2239 § 2

CROSS REFERENCES: cc. 37, 51

COMMENTARY

Alphonse Borras

1. Here are some provisions relating to the remission of penalties, or rather, different circumstances in which penalties may be remitted. In § 1, there is the possibility of remitting a penalty in the absence of the offender. The adverb *etiam* means that a penalty may *also* be remitted in the absence of the author of the offense. In other words, a penalty is normally remitted in the presence of the person sanctioned. In commenting upon the corresponding canon in *CIC*/1917 (c. 2239 § 1), E. Jombart wrote that a penalty may be remitted "from any distance, by letter, messenger, telegraph, telephone or radio."[1] Today, it could also be remitted by fax. Remission in the external forum may be granted *etiam absenti*, because it is an act of executive power. On the other hand, remission in the internal sacramental forum requires the presence of the offender.

1. E. JOMBART, "Des délits et des peines," in R. NAZ (Ed.), *Traité de droit canonique*, t. 4, 2nd ed. (Paris 1954), p. 623.

2. Paragraph one also provides that a penalty may be remitted conditionally. The condition may be suspensive or decisive. This was established in the corresponding canon of *CIC*/1917 (c. 2239 § 1), which also stated the various types of suspensive conditions. First, there may be a suspensive condition *de praeterito*, relating to the past, for example, if the offender has made restitution of a stolen object. The suspensive condition *de praesenti* concerns the present, for example, if the superior actually has the power to remit. Finally, there could be the suspensive condition *de futuro*, pertaining to the future, for example, if the superior absolves for the time when the offender shall have repaired the damage in question. Before a *suspensive* condition, remission operates only when the condition is *effectively* verified. In contrast, with a *decisive* condition that can refer only to the future, remission is granted immediately in the external forum; but if later the condition is not fulfilled, the offender is returned to his penalty (for example, if he does not submit something within a certain time limit). That condition is called *ad reincidentiam*. Canonical doctrine includes more types of remission depending upon the condition imposed. A penalty may be remitted *ad effectum dumtaxat*, to allow a favor to be received or a right to be exercised (for example, the right of election). This means that the penalty has been remitted only *for that effect*, but it continues for the rest. Remission may be also be granted *ad cautelam*, in case of doubt of fact.[2]

3. The second paragraph prescribes that remission in the external forum must be in writing, at least in principle, since a grave cause might make it advisable to act otherwise. That principle constitutes a specific application of the provisions for singular administrative acts pertaining to the external forum (c. 37; cf. c. 51). Paragraph two of this canon substantially includes c. 2239 § 2 of *CIC*/1917, which did not state a mandate, as here (*detur scripto*), but a recommendation, with a touch of appropriateness or utility (*expedit*). The provision in c. 1361 § 2 is not *ad validitatem*, since the legislator provides for the possibility of an exception for grave cause. The exception, however, will always depend upon an assessment by the competent authority. To be valid, remission must be express, perceptible, and *manifest*. To be licit, it must respect the provisions established for the case by law: *detur scripto*.

4. Paragraph § 3 states the principle of non-publication for both the petition to remit a penalty and for the remission itself. That provision is new; it was not found in *CIC*/1917. It is for the competent authority to assess both the utility of publication, depending upon protection of the offender's reputation, and the need, depending upon reparation for the

2. The canonists of yesteryear emphasized the necessity for the confessor, even if he does not have a serious doubt, to pronounce the formula "in quantum possum et tu indiges" before absolving the sin and, if it is the case, the delict. Cf. E. JOMBART (who cites M.C. A CORONATA), "Des délits...," cit., p. 624.

scandal. In the assessment, the competent authority must keep in mind the public or occult character of the penalty in question. Actually, the provision in § 3 is not *exclusively* addressed to the authority with competency to remit, but may also affect the offender. In other words, to safeguard his reputation or to repair scandal, in certain cases it will be useful and advantageous, even necessary, for the offender to divulge the remission of his penalty, if the competent authority has remitted it. An example would be to counteract a rumor that gravely twisted and exaggerated the facts, the offense or the penalty incurred, or to contradict false information on the offender's canonical situation.

1362 **§ 1. Actio criminalis praescriptione extinguitur triennio, nisi agatur:**

1° de delictis Congregationi pro Doctrina Fidei reservatis;

2° de actione ob delicta de quibus in cann. 1394, 1395, 1397, 1398, quae quinquennio praescribitur;

3° de delictis quae non sunt iure communi punita, si lex particularis alium praescriptionis terminum statuerit.

§ 2. Praescriptio decurrit ex die quo delictum patratum est, vel, si delictum sit permanens vel habituale, ex die quo cessavit.

§ 1. A criminal action is extinguished by prescription after three years, except for:

1° offences reserved to the Congregation for the Doctrine of the Faith;

2° an action arising from any of the offences mentioned in cann. 1394, 1395, 1397, 1398, which is extinguished after five years;

3° offences not punished by the universal law, where a particular law has prescribed a particular period of prescription.

§ 2. Prescription runs from the day the offence was committed or, if the offence was enduring or habitual, from the day it ceased.

SOURCES: § 1: cc. 1703, 2240; *REU* 29, 31, 32, 35, 36
§ 2: c.1705

CROSS REFERENCES: cc. 1341, 1717–1728

COMMENTARY

Alphonse Borras

1. This canon deals with the prescription of criminal actions. Prescription is a legal method of extinguishing an action. It operates by the lapse of the time allowed for initiating an action. In the area of criminal actions, however, prescription is not the only way to extinguish an action; it may also be extinguished by the death of the offender and by condonation. Condonation is an act by the legitimate authority that in some way erases the punishable deed, and thus prevents or stops prosecution of the person imputed to have committed the deed (cf. *CIC*/1917, c. 1702).

During the reform of *CIC*/1917, some people maintained that the legislation did not recognize a distinction between a criminal action and a penal action. It is true that c. 2210 § 1,1° referred to "a penal action" which really should have been called "a criminal action." In addition, doctrine was not always clear about the notions and the distinction between them. Now, there is no possible doubt—the legislator himself establishes the distinction.

A criminal action is a *public* action that arises from the offense. It is brought *in the name of the Church* by the competent authority, that is, an ordinary who adopts the decision, following c. 1341, after having exhausted all other pastoral means to obtain the amendment of the offender, the re-establishment of justice, and the reparation of scandal. A criminal action concerns either declaration of a penalty incurred *latae sententiae* or imposition of a penalty *ferendae sententiae* (cf. cc. 1717–1728).

The public good of the Church requires that a criminal action be initiated within a certain time. After that time has elapsed, the action is extinguished by prescription. Canon 1362 sets a time period of three years in principle, with various exceptions listed.

The first exception refers to offenses reserved to the Congregation for the Doctrine of the Faith, which is governed by its own norms, as provided in *Pastor Bonus* 52. Those norms will, if the case arises, establish another period of prescription.

The second exception includes a group of offenses for which the time period is five years. First is marriage attempted by the clergy or religious in perpetual vows (c. 1394); in addition, a cleric living in concubinage (c. 1395 § 1), a cleric's scandalous continuance in an external sin against the sixth commandment (c. 1395 § 1), other offenses against this commandment aggravated by circumstances such as violence, threats, publicity and a minor under sixteen years of age (c. 1395 § 2). To these offenses, one can add homicide, kidnapping, detention by force or fraud, mutilation or grave injuries (c. 1397), including abortion (c. 1398).

The third exception deals with offenses punished under a particular law and not by universal law, and for which the particular law establishes a different period of time.

2. Paragraph two of this canon details how to calculate the time period. In general, prescription runs from the day the offense was committed. This refers to a *simple* offense (when there is unity between the offense and the violated law) and to a *complex* offense (when there is a plurality of offenses and unity of violated law). However, if it is a permanent or habitual offense, prescription runs from the day the offense ceased. An offense is *permanent* if it is uninterrupted; that is the case, for example, of offenses in bringing up children outside the Catholic Church (c. 1366), or an obstinate refusal to obey a command or prohibition (c. 1371,2°). An offense is *habitual* when the law considers the habitual

behavior of its author in many repeated acts to be a single offense, such as engaging in trade or business by clergy or religious (c. 1392).

3. A criminal action is distinguished from a civil or contentious action arising from an offense and tending to ensure reparation of the damage. In this regard, the Code speaks of an action "for the repairing of damages" (*ad damna reparanda*). Canon 1729 § 1 describes it as a contentious or penal action that the injured party may exercise, according to c. 1596, for the repairing of damages sustained due to the offense. The action for repairing damages is in a certain way within the criminal action. It must be taken into consideration that the extinction of a criminal action does not extinguish an action for the reparation of damages (cf. *CIC*/1917, c. 1704,1°).

1363 **§ 1. Si intra terminos de quibus in can. 1362, ex die quo sententia condemnatoria in rem iudicatam transierit computandos, non sit reo notificatum exsecutorium iudicis decretum de quo in can. 1651, actio ad poenam exsequendam praescriptione extinguitur.**

§ 2. Idem valet, servatis servandis, si poena per decretum extra iudicium irrogata sit.

§ 1. An action to execute a penalty is extinguished by prescription if the judge's decree of execution mentioned in can. 1651 was not notified to the offender within the periods mentioned in can. 1362; these periods are to be reckoned from the day the condemnatory judgement became an adjudged matter.

§ 2. The same applies, with the necessary adjustments, if the penalty was imposed by an extra-judicial decree.

SOURCES: cc. 1703, 1918, 2240

CROSS REFERENCES: cc. 1341, 1342 § 1, 1362, 1651, 1653 § 1

COMMENTARY

Alphonse Borras

1. This canon deals with prescription for a penal action *ad poenam exsequendam*. This action arises from a declaratory or imposed sentence, and its purpose is to obtain execution of the sentence. Execution of a declaratory or imposed sentence is within the competence of the ordinary, not the judge. An ordinary may suspend the obligation to execute an expiatory penalty, thus granting a suspension according to the terms of c. 1344,3°. However, it may happen that, after a judge has handed down the sentence and executory decree (c. 1651), the offender is not notified of the decree. If there is no notification, the sentence cannot be executed. Although an executory decree falls to the judge, execution falls to an ordinary (cf. cc. 1348 and 1653 § 1). The ordinary may have another execute the judgment: *mandare sententiam exsecutioni* (c. 1653 § 1).

Paragraph one establishes that, if an ordinary is late and does not have the judgment executed before the deadline, the penal action is extinguished by prescription. The prescription times for a penal action are the same as for a criminal action.

2. Paragraph two contains a provision consistent with what was previously established in c. 1342 § 1. Here, provision is made for the possibility of an extra-judicial or administrative decree to execute a penalty imposed by a decree made after an administrative procedure. However, this is the exception; the general rule is a judicial procedure, unless just causes oppose it.

Strictly speaking, c. 1363 considers *expressis verbis* only prescriptions for a penal action relating to an imposed sentence, also called condemnatory (*sententia condemnatoria*). However, it is our opinion that execution of a *declaratory* sentence is also subject to prescription. The preparatory work on the Code is *deliberately* silent on the case of a *declaratory* sentence. It was considered that there was no executory decree for *latae sententiae* penalties.[1] Since *latae sententiae* penalties are applied automatically "ipso facto commissi delicti" (c. 1314), there is no need to issue an executory decree for its effects. However, with regard to its declaration, one cannot say the same, since it has specific consequences, in particular, the obligation to observe in the external forum the effects *already produced latae sententiae* and, sometimes, certain supplementary effects added to those already produced. A good example is the provision in the Code for supplementary effects inherent in the declaration of excommunication incurred *latae sententiae* (c. 1331 § 2). Along with J. Arias, we maintain that declaring a penalty *latae sententiae* requires an executory decree by the judge, referring to the effect *proper* to the declaration, and not to the execution of the effects produced *latae sententiae*. An ordinary must execute a declaratory sentence. Therefore, according to the terms of c. 1363, after the time period has lapsed, execution of the effects of the declaration can no longer be required.[2]

1. *Comm.* 9 (1977), p. 174.
2. J. ARIAS, commentary on c. 1363, in *Pamplona Com*; also the opinion of F. AZNAR, commentary on c. 1363, in *Salamanca Com*.

PARS II
De poenis in singula delicta

PART II
Penalties for Particular Offences

INTRODUCTION
Ángel Marzoa

1. *Introduction*

In the second part of book VI of the *CIC*, each type of behavior that the supreme authority considers an offense is described, as well as the penalties to be applied to the offenders. This is the "special part" of penal law, in contrast to the "general part" (part I).

There has been a notable reduction in the number of canons from *CIC*/1917. The reasons inspiring the preparation of part II are as follows:

a) The desire to limit the scope of coercive powers in the Church. As Nigro observed, the point is "to offer a legal framework which safeguards a set of values highly relevant to the entire Church, under whose unfailing protection the particular churches ought to feel involved."[1]

b) The application of the principle of decentralization in penal matters, so that "the principle of subsidiarity and the necessity to define the minimal coercive instruments without which the ecclesiastical society could not remain intact"[2] are harmonized.

c) The exclusion of offenses sufficiently penalized in civil law.

1. F. NIGRO, in P.V. PINTO (Ed.), *Commento al Codice di Diritto Canonico* (Rome 1985), p. 800.

2. *Praenotanda* of the *Schema documenti quo disciplina sanctionum seu poenarum in Ecclesia latina denuo ordinatur* (Typis Polyglottis Vaticanis 1973), pp. 9–10. Cf. also *Comm.* 6 (1974), p. 34. The principle of subsidiarity was the fifth of the *Principles*: cf. *Comm.* 2 (1969), pp. 80–82, 89, 96. At the same time, the reduction of the number of penalties formed part of the ninth principle: cf. ibid., pp. 84–85. For the principle of subsidiarity in the matter of penalties, cf. the study of J. SANCHIS, "Rilevanza del principio di sussidiarietà nel sistema penale del codice de 1983," in *Monitor Ecclesiasticus* 114 (1989), pp. 132–142.

In the first *Schema* (1973), these criteria led to a drastic reduction in the number of offenses from *CIC*/1917; the special part contains only twenty-six canons.[3] This gave rise to many proposals regarding the inclusion of other offenses, such as unjust war, genocide, and pornography. However, the Commission decided those cases would not be included in canon law, either because they are sufficiently punished by civil law or because a thorough investigation and persecution of them is beyond the Church's means. It is enough to have clear and frequent disapproval of those types of conduct expressed by the Magisterium. From the point of view of canon law, it is more important to attend to offenses with special importance in the ecclesial order, the punishment of which is necessary to safeguard its social order.[4]

Other proposals for specific types of offenses were considered individually. Thus, it was considered timely to include the cases covered in the current cc. 1365, 1366, 1369, 1372, 1374, 1380, 1382 and 1396. Some proposals, however, were not taken into consideration. These proposals included the matter of recording a sacramental confession, which was rejected because the question goes to very specific cases; therefore, it considered improper to include them in the general law.[5] In addition, the proposal to include bigamy was opposed because, if it were penalized with a *ferendae sententiae* penalty, the penalty would not be applied, and penalizing it with an automatic penalty was contrary to the maximum restriction criterion by which the task of codification was guided.[6]

It should be noted that, although the reduction of the number of canons devoted to this material is evident (36, in comparison with 101 in *CIC*/1917), the reduction in the number of offenses is as significant. Some of the offenses included in *CIC*/1917 are not specified in *CIC*, but they have not all disappeared. Instead, they are included in broad classifications of offenses that have been drawn up with a rather peculiar juridical technique. Sometimes, these generalized classifications actually include a greater number of cases.[7] In addition, there are other *extravagant* offenses, which are included in canons outside of book VI.[8] With regard to general legislation, there are post-Code norms, such as the *Decreto General* of the CDF of September 23, 1988, which designates offenses against

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3. Cf. Code Commission, *Schema documenti*..., cit., pp. 27–31 (cc. 48–73).
4. Cf. *Comm.* 9 (1977), p. 319.
5. In spite of this, in 1988, the CDF penalized this conduct by means of the *Decreto General* of September 23, 1988 (see commentary on c. 1388), in *AAS* 80 (1988), p. 1367.
6. Cf. *Comm.* 9 (1977), pp. 318–320.
7. Cf., e.g., cc. 1365 (in relation with cc. 2315, 2316 and 2319 § 1,1° *CIC*/1917), 1369 (2323 and 2344 *CIC*/1917), 1375 (2334, 2337, 2345, 2346, 2390 *CIC*/1917), 1379 (2322, 2367 *CIC*/1917), 1389 (2404–2414 *CIC*/1917), 1397 (2351, 2353, 2354 *CIC*/1917).
8. Cf., e.g., cc. 1457, 1488, 1489, 1741,4°.

the dignity of the sacrament of penance and the right of the faithful,[9] and there are offenses included in the RGCR.

2. *Classification*

Canon 1321 establishes that "no one can be punished for the commission of an external violation of a law or precept unless it is gravely imputable by reason of malice or of culpability." Therefore, there can be no punishment (*nulla poena*) if there is no offense. Any act or omission can only be an offense (*nullum crimen*) if a penal norm designates it as one ("sine lege poenali praevia").[10]

Thus, the term "designation" or "classification" refers to a technique that consists in designating in a norm a factual supposition that deserves a penalty. Any behavior that is unequivocally subsumable in the designated supposition meets the requirements that, while the objective and subjective elements must still be verified, enable it to be considered to be a punishable offense.

Therefore, to determine whether a deed is penally relevant, one must look at the penal norms as the decisive criteria. If the deed committed fully fits within any of the types of offense described in the penal norms, it is materially anti-juridical. However, one must determine whether the other elements that make up the concept of offense are present in the commission of the deed before it can be effectively imputable and from it a penal sanction can be derived.[11]

Canons 1364–1399 describe the universal types of offenses for the Latin Church (the *CCEO* does the same in cc. 1436–1467). To these must be added the offenses established by laws outside of the Code or by the supreme authority for the entire Church, and the supreme authority or lesser authorities for any Church circumscription.

3. *Penally protected goods*

Taken together, the set of designated offenses provides an overall vision of what the legislator thinks about which juridical goods most need protection, and within that group, looking at the gravity of the penalties provided for each type, which are the most important. Thus, part II of book VI gives a "negative" of the broad outlines of the portrait the Church

9. Cf. note 5.
10. See, for the penal principle of legality and the idea of the crime, the introduction to book VI and commentary on c. 1321.
11. See, for the concepts of *anti-juridicality, imputability,* and *punishability*: introduction to tit. III of part I of book VI.

makes of itself. If *latae sententiae* penalties are considered the gravest (cf. c. 1318), followed by offenses with preceptive punishment, the following groups emerge:

a) Those protected with *latae sententiae* penalties: the unity of faith and governance (heresy, apostasy and schism: cf. c. 1364); the dignity of the sacraments (Eucharist, penance and sacred orders, directly: cf. cc. 1367, 1378, 1382, 1383, 1388); and the Hierarchy (Roman Pontiff and bishops: cf. c. 1370).[12] There are, in addition, the honor/reputation of a confessor (false denunciation of solicitation: cf. c. 1390), human life (especially abortion: cf. c. 1398) and celibacy (cf. c. 1394).

b) Those protected with *preceptive* penalties: prohibited *communicatio in sacris* (c. 1365); non-Catholic baptism or nurture (c. 1366); perjury before ecclesiastical authority (c. 1368); blasphemy, grave harm to public morals or slander towards religion or the Church, or exciting hatred, aversion or contempt for religion or the Church (c. 1369); violence against priests or religious in contempt of faith, the Church, ecclesiastical power or the ministry (c. 1370 § 3); obstinacy in teaching condemned doctrines or in disobeying legitimate commands or prohibitions by ecclesiastical authority (c. 1371); recourse against an act of the Roman Pontiff (c. 1372); public provocation of hatred or inducing disobedience to ecclesiastical authority because of some act of power or ministry (c. 1373); joining, promoting or taking office in associations that plot against the Church (c. 1374); profaning a sacred object (c. 1376); illegitimate alienation of ecclesiastical goods (c. 1377); simulating the sacraments (c. 1379); simony in administering the sacraments (c. 1380); usurping or unlawfully retaining ecclesiastical office (c. 1381); unduly profiting from Mass offerings (c. 1385); active and passive bribery in exercising ecclesiastical functions (c. 1386); solicitation in confession (1387); violation of the secret of confession (c. 1388 § 2); abuse of power or office, or negligence in exercising power, ministry or office with harm to others (c. 1389); engaging unlawfully in trade or business by clerics or religious (c. 1392); concubinage or scandalous situation of a cleric (c. 1395); failure to fulfill the obligation of residence (c. 1396); and homicide, abduction, forceful imprisonment, and mutilation (c. 1397).

Claiming that the legislator should try to designate every type of behavior harmful to a just social order as an offense results in a kind of "quixotic legislation" (see commentary on book VI). It would end up causing *ius puniendi* to be ineffective. The legislator must exercise legislative prudence to the maximum and, at each moment in time, must choose to protect certain juridical and social goods, leaving others without penal protection. Each legislative act by the human legislator is a decision in

12. This grouping corresponds substantially with the *communio fidei, sacramentorum et regiminis* of c. 205, that is, with the elements that constitute the bonds of *communio*, a characteristic observed by F. NIGRO, in P.V. PINTO (Ed.), *Commento*..., cit., p. 800.

prudence, with exceptions made for cases involving natural or positive divine law. Each legislative decision is made at a specific moment in time. This happens more palpably in penal legislation, which always includes a component of choice. It is obvious that this choice is always open to criticism. Legitimate, constructive criticism can never carry with it even the least suspicion of disobedience. The legislator, in his prudence, will have obtained the advice of experts and persons responsible for tasks of governance; therefore, when he makes a decision, that is the norm and, as such, must be respected.

4. *Necessary relation with part I*

Part II of book VI is a clear example of legislative decision-making. The offenses it names are those that, at this point in time, in addition to those proceeding from extra-codicial norms, are punishable. They reveal the principal sensitivities of the Church with respect to protecting the ecclesial *bonum commune*. Whoever is responsible for applying the norms must respond to the legislator's decision and be able to assess the importance, appropriateness and need to impose or declare penalties. Therefore, an adequate knowledge of the general norms (cc. 1311–1363) is essential, since they must guide the application of the canons that follow on the elements of an offense, the nature of penalties and the criteria for choosing and applying them.

5. There are several the types of offenses, illustrated by the systematic grouping in the different titles:

I. *Against religion and the unity of the Church* (cc. 1364–1369)
   1. Heresy, apostasy and schism
   2. Prohibited *communicatio in sacris*
   3. Baptism and educating children in a non-Catholic faith
   4. Profanation of the sacred species
   5. Perjury before ecclesiastical authority
   6. Blasphemy and other attacks on public morals
   7. Raillery or inciting to hatred or contempt of religion and the Church

II. *Against Church authorities and the freedom of the Church* (cc. 1370–1377)
   1. Physical violence against the Pope, bishops, clergy or religious
   2. Teaching doctrine condemned by the Roman Pontiff or a Council
   3. Disobeying legitimate mandates from ecclesiastical authority

4. Recourse against an act of the Roman Pontiff
5. Inciting to aversion/hatred or disobedience to the Apostolic See or an ordinary because of an act of ecclesiastical power or ministry
6. Joining, promoting or serving as an officer of an association that plots against the Church
7. Impeding or coercing acts of an ecclesiastical nature
8. Profaning a sacred object
9. Unlawful alienation of ecclesiastical goods

III. *Usurpation of ecclesiastical functions and offenses committed in their exercise* (cc. 1378–1389)

1. Absolution of an accomplice
2. Attempting to celebrate the Eucharistic Sacrifice and confession
3. Simulation in other sacraments
4. Simony in administering or receiving sacraments
5. Usurping or unlawfully retaining ecclesiastical office
6. Episcopal ordination without pontifical mandate
7. Ordination without lawful dimissorial letters
8. Unlawfully exercising sacerdotal office or sacred ministry
9. Trafficking for profit in Mass offerings
10. Active and passive bribery
11. Solicitation in confession
12. Violation of the sacramental seal
13. Violation of the secret preceding confession
14. Abuse of power or office
15. Negligence with damage in exercising power, ministry or office

IV. *The crime of falsehood* (cc. 1390–1392)

1. False denunciation of solicitation before an ecclesiastical superior
2. Calumnious denunciations of offenses or damage to the good name of another
3. Falsification, destruction, alteration or concealment of a public ecclesiastical document
4. Use of a false or altered public document in an ecclesiastical matter
5. Obreption and subreption in a public ecclesiastical document

V. *Offences against special obligations* (cc. 1392–1396)

1. Prohibited engagement in trade or business by clergy or religious
2. Infraction of penal obligations
3. Attempted marriage by clergy or religious in perpetual vows
4. Offenses against the sixth commandment by clergy
5. Failure to fulfill the obligation of residency

VI. *Offences against human life and liberty* (cc. 1397–1398)
1. Homicide, abduction or forced imprisonment, mutilation, grave injuries
2. Consummated abortion

VII. *General norm* (c. 1399)

TITULUS I
De delictis contra religionem et Ecclesiae unitatem

TITLE I
Offences Against Religion and the Unity of the Church

1364 **§ 1. Apostata a fide, haereticus vel schismaticus in excommunicationem latae sententiae incurrit, firmo praescripto can. 194 § 1, n. 2; clericus praeterea potest poenis, de quibus in can. 1336 § 1, nn. 1, 2 et 3, puniri.**

§ 2. Si diuturna contumacia vel scandali gravitas postulet, aliae poenae addi possunt, non excepta dimissione e statu clericali.

§ 1. An apostate from the faith, a heretic or a schismatic incurs a *latae sententiae* excommunication, without prejudice to the provision of Can. 194 § 1 n. 2; a cleric, moreover, may be punished with the penalties mentioned in Can. 1336 § 1 nn. 1, 2 and 3.

§ 2. If a long-standing contempt or the gravity of scandal calls for it, other penalties may be added, not excluding dismissal from the clerical state.

SOURCES: § 1: c. 2314 § 1; CodCom Resp., 30 iul. 1934, I (*AAS* 26 [1934] 494); SCHO Decr. *Quaesitum est*, 1 iul. 1949, 4 (*AAS* 41 [1949] 334); DE/1967 19, 20
§ 2: c. 2314 § 1,2° et 3°

CROSS REFERENCES: cc. 194, 205, 290–293, 750–751, 1314, 1330, 1331, 1336, 1350

COMMENTARY

Ángel Marzoa

It is desirable to give the Church's most fundamental goods and interests special penal protection. Therefore, the first canon devoted to designation of offenses concerns behavior contrary to the Church's most prized deposit, communion in faith and discipline, which, together with communion in the sacraments are the *tria vincula* that make up full communion in the Church (cf. c. 205).

I. The Notions of Heresy, Apostasy and Schism

In the designation of the offenses of heresy, apostasy and schism, the canon does not define those notions. Instead, as in other parts of part II, the legislator leaves the task of definition to doctrine. The same occurs with the designation of abortion, homicide, concubinage, simulation, usurpation, and sacrilegious purpose as offenses.

Thus, for a description of the factual supposition that underlies the criminal act, one must have recourse to other parts of the *CIC* and to doctrine. In this case, one must look at c. 751, which contains definitions of heresy, apostasy and schism in the context of the *munus sanctificandi* (book III). However, in this canon, it is heresy, apostasy and schism that are defined, not the respective offenses. Therefore, from c. 751, one can draw only the objective element of the offense designated in c. 1364. One must consider the component of grave juridical-penal imputability to determine who is *penally* a heretic, apostate or schismatic. In c. 751, the legislator preferred to define the suppositions, in contrast to the parallel canon, c. 1325 *CIC*/1917, that directly defined who was a heretic, apostate or schismatic, although there are no perceptible differences regarding the material content of the definitions.

II. The Offences of Heresy, Apostasy and Schism

Based on what one must understand as heresy, apostasy and schism based on c. 751 and the doctrine on those concepts, one may describe *the offense*. It is important to note that heresy is not the same as the offense of heresy. A person may formally be a heretic without committing the offense of heresy (for example, under c. 1330, someone who states or manifests his will opposed to a divine and Catholic truth but the statement or manifestation is not actually perceived by anyone; or cases where there is

insufficient juridical-penal imputability *ex* cc. 1322–1323). In addition, under c. 1324, there may be an offense of heresy that is not legally punishable due to an attenuating factor. Thus, to interpret this canon adequately, one must distinguish between the doctrinal notions of heresy, apostasy and schism, the corresponding offenses, and the penalties for each of the offenses.

1. *Formation of the text of the canon*

Reflection, at least summarily,[1] upon the vicissitudes the drafting of this canon underwent, especially on the question of whether punishment for these offenses should be a *latae* or *ferendae sententiae* penalty, will help clarify the distinction between the suppositions, in this case, sins, of heresy, apostasy and schism, and the corresponding offenses. From the questions that were most debated in the successive *Schemata*, one may draw elements of interest for interpreting the current text.

a) The 1973 *Schema* (c. 48) named only the offenses of heresy and schism. It provided for *ferendae sententiae* penalties (censures for heretics and excommunication for schismatics), with special consideration for the clergy.[2]

Among the *animadversiones* received upon drafting the canon were requests to designate the offenses of apostasy and heresy separately, and to mention not only persons who *schisma suscitant* but also those who *factioni schismaticae adhaerent*. With regard to penalties, it was questioned whether the principal penalty should be an undetermined censure or the censure of excommunication and, if excommunication, whether it should be *latae* or *ferendae sententiae*.[3]

With respect to the separate designations of the offenses of heresy and apostasy, it was decided to classify them as separate offenses, and the question was not debated further. (The underlying question: an apostate is always a heretic, and all heresy is as least seminally apostasy, since it influences the foundation of all faith in the Church taken in its unity and that unity does not lie in the intrinsic truth of each item of its contents but in the authority of God Himself that it reveals.[4] Thus, there would be no

1. For a detailed study in light of the documentation, cf. A.T. GUTIÉRREZ-MATURANA, "El delito de herejía: 'iter' jurídico," in *Cuadernos Doctorales* 10 (1993), pp. 157–23. We have relied for the most part on this study (cf. pp. 198ff) for this part of the commentary.

2. Cf. Code Commission, *Schema Documenti quo Disciplina sanctionum seu poenarum in Ecclesia latina denuo ordinantur* (Typis Polyglottis Vaticanis 1973), p. 27 (c. 48).

3. Cf. *Comm.* 9 (1977), pp. 304–305.

4. Cf. CONC. VATICAN. I, Const. Dogm. *Dei Filius*, in *AAS* 5 (1869), p. 486.

difference of species between apostasy and schism[5]). With respect to the distinction between those who *schisma suscitant* and those who *factioni schismaticae adhaerent*, it was decided to include all cases under the single mention of *schismaticus*. This question also was not discussed at any later time.

Concerning penalties, the question of the penalty was resolved in favor of excommunication. Concerning the method of incurring the penalty, "post aliquam discussionem Consultores concordant de statuenda poena excommunicationis ferendae sententiae. Excluditur poena latae sententiae quia perdifficilis est in hac implexa materia ut habeatur necessaria certitudo iuridica de delicto commisso sine interventu iudicis vel superioris."[6] The reason adduced by the drafting group is strictly juridical: the necessary juridical certainty about whether an offense has been committed where penal law should be applied and objective criteria used.

At this point, the draft of the canon was accepted into the 1980 *Schema* (c. 1316), with explicit mention of the three offenses of heresy, apostasy and schism. For all three, excommunication *ferendae sententiae* was imposed as the principal penalty. There followed special consideration for the clergy, continued contumacy and grave scandal, where no modifications of note were made.[7]

b) The principal *animadversio* made to c. 1316 of the 1980 *Schema* pertained to the method of incurring the penalty. Some of the Fathers consulted proposed that the penalty be *latae sententiae*.[8] Those who defended the *latae sententiae* method said that anyone committing the offense, by the very act of committing it, is no longer in full communion with the Church, regardless of whether a penalty is imposed. In addition, the possibility had to be avoided that bishops might act differently in some cases than in others.

The response from the drafting group could hardly be more definitive: "Poena non potest esse latae sententiae." Their argument consisted of the following points: *a*) Only certain offenses may be punished with *latae sententiae* penalties; they are specific and determinate acts where there is room for no possible doubt (the offenses of abortion and physical

5. Cf. ST. THOMAS AQUINAS, I *Sent.*, d. 11, 6; expressly affirmed by A. BEUGNET, "Apostasie" in *Dictionnaire de théologie catholique*, I (Paris 1931), p. 1604. Cf. also, more directly related with criminal considerations, C.J. ERRÁZURIZ, "La protezione giuridico-penale dell'autenticità della fede," in *Monitor Ecclesiasticus* 114 (1989), p. 125.

6. *Comm.* 9 (1977), p. 305.

7. *Schema Codicis Iuris Canonici iuxta animadversiones S. R. E. Cardenalium, Episcoporum Conferentiarum, Dicasteriorum ecclesiasticorum, necnon Superiorum Institutorum vitae consecratae recognitum*, 1980.

8. Cf. *Relatio complectens synthesim animadversionum ab Em.mis atque Exc.mis Patribus Commisionis ad novissimum schema Codicis Iuris Canonici exhibitarum, cum responsionibus a Secretaria et Consultoribus datis* (Typis Polyglottis Vaticanis 1981), pp. 300–302. For the canon that concerns us, cf. *Comm.* 15 (1984), pp. 46–48.

attempts against the Roman Pontiff are mentioned), and this is not the case with these offenses. *b*) A distinction must be made between the *objective reality* that someone may be outside of communion with the Church, and the *penal sanction* imposed. It is not the same thing; clearly, everyone who is baptized and outside of ecclesial communion is not for that reason excommunicated. *c*) The penalty of excommunication punishes *the offense* of heresy, apostasy or schism. The offense needs to be juridically assessed so that the objective gravity of the act and imputability can be determined. In such an important matter, the greatest possible juridical security is desirable, and that can be achieved only if the judge or superior ponders the case and all its circumstances and decides that there is an offense and consequently that a penalty is to be imposed. *d*) *Automatic application of the penalty* cannot be required when in reality, even for the offender, this is frequently an obscure matter.

The drafting group relator gave several examples regarding the difficulty in determining with certitude whether there were offenses of heresy or schism. In the cases he mentioned, after long investigation, the SCDF did not reach any definitive solutions[9] and instead reached the following conclusion: "From these and other cases it is clear that it is not desirable to punish heresy or schism with penalties *latae sententiae* on account of the intrinsic difficulty of determining when these offenses are really committed."[10] The relator concluded that the necessary defense of the faith is provided for sufficiently by the fact that the penalty is not merely facultative, but the authority of jurisdiction has an *obligation* to impose it.[11]

With regard to the efficacy of the penal protection, the same observation would apply here as the observation in response to the proposal that the offense in c. 1326 in the *Schema* (currently c. 1374) be punished with a *latae sententiae* penalty: "In genere facilis recursus ad poenas latae sententiae numquam solvit difficultates et indicat quandam incapacitatem proprium munus gubernationis adimplendi."[12]

It can be seen that the argument against imposing *latae sententiae* penalties is impeccable. All of this takes place within the limits imposed by an adequate understanding of what the *penalty,* not the ecclesial fact, of excommunication is,[13] and the rationality of the juridical-penal system. This is why the draft of the canon remained unaltered on this point and

9. Cf., for detailed information regarding these cases, A.T. GUTIÉRREZ-MATURANA, "El delito de herejía...," cit., pp. 211–214.
10. Cf. *Comm.* 16 (1984), p. 47.
11. Cf. ibid.
12. Ibid., p. 49.
13. Cf. Á. MARZOA, *La censura de excomunión* (Pamplona 1985); idem, "El excomulgado y el derecho a los sacramentos," in *Les Droits Fondamentaux du Chrétien dans l'Église et dans la société* (Fribourg 1981).

passed into c. 1364 of the 1982 *Schema* with the mandatory *ferendae sententiae* penalty of excommunication.[14]

c) However, the final project (*Schema novissimum*) was still to be revised by a small group of canonists and theologians before promulgation. Although we have no more information on the matter,[15] the result is that the current c. 1364 establishes the penalty of excommunication, *latae sententiae*, for the offenses of apostasy, heresy and schism.

All of which leads to the following reflection. This is no attempt to question the validity of the decision for c. 1364, nor does it influence its effect. But perhaps it has not been sufficiently kept in mind, and we have the paradox that in attempting to repress the offenses in question more effectively, the final result is that the penal sanction established is inoperable. Therefore, it does not achieve the desired juridical-penal protection of the Church's fundamental goods. Perhaps what underlies this debate is the inadequate conceptual separation between the rupture of communion (cf. c. 205) and what might be, but is not necessarily, a consequence of that rupture with its own effects, that is, the penalty of excommunication. The rupture of communion takes place *ex materia*; it is a rupture of the "bonds of profession of faith, the sacraments and ecclesiastical governance" (c. 205). It is in no way *ex delicto*, because the offense consists precisely of the rupture. There is an offense of apostasy, heresy or schism only when there is a rupture with the *communio Ecclesiae*. It is the rupture that is designated as an offense. Therefore, it is not the commission of the offense that ruptures *communio*. But, the fact that, given all the elements, such types of behavior are designated as offenses means that the legislator wishes to assert that they are especially harmful for the *bonum Ecclesiae* and wishes to add special protection for the goods of the faith, sacraments and ecclesiastical discipline. For that reason, designation as an offense carries with it a penalty (excommunication), the imposition of which does not simply consist of an external certification that something has happened, although that is certainly the assumption, but of the *ex novo* juridical constitution of a peculiar position of the offender in the Church with its own effects (cf. c. 1331 for the case of excommunication): "effects which are given precisely because there is an excommunication, not because there is a sin."[16] An excommunicated offender is in a *different* situation than someone who is not in full communion with the Church by virtue of c. 205. In the discussion prior to promulgation that had absolutely no effect on the effectiveness of the promulgated norm, the reasons that we believe led to maintaining that excommunication should be automatic were along the lines of a certain similarity between the fact that

14. Cf. *Schema novissimum iuxta placita Patrum Commissionis emendatum atque Summo Pontifici praesentatum.*

15. See for background on this prior revision, vol. I: J. HERRANZ, "Prologue II, Genesis and Development of the New Code of Canon Law", p. 162ff.

16. Cf. V. DE PAOLIS, *De sanctionibus in Ecclesia* (Rome 1986), p. 113.

someone has broken some bond of communion (c. 205) and the penalty of excommunication, as if they were simply two points of view, which is certainly not the case. A member of the faithful who is excommunicated is a member of the faithful who in the Church has his own juridical situation. In some cases, it assumes that full ecclesiastical communion has been broken (the offenses of heresy, apostasy and schism, which materially assume a break in some bond of communion: c. 205). But, in other cases, this is not so; for example, actions such as abortion cannot be said to imply a rupture with ecclesiastical communion, at least in the same sense. From the point of view of a desirable juridical technique, the best thing would have been to impose the penalty *ferendae sententiae*, for the clear reasons given by the drafting commission. Then, after the sin of heresy was proved and the elements that constitute the offense were assessed, excommunication could either be imposed or not.

2. *Offenses*

a) *Apostasy from the faith*

In *CIC*/1917, two types of apostasy are mentioned, apostasy of faith and apostasy of religion. Typical of the second type is the case of a religious of perpetual vows who unlawfully leaves his religious house intending to abandon the religion permanently (cf. cc. 644 and 2385 *CIC*/1917).

Using the term more strictly, *CIC* does not mention apostasy of religion (the case is referenced to the governance of religious life: cf. especially cc. 696–697 in relation to 665).[17] Apostasy is understood exclusively as a total rejection of Christian faith. It is in those terms that c. 751 defines the sin of apostasy. For the consummated offense of apostasy to occur in that material supposition, in addition to the elements of grave juridical-penal imputability deduced from cc. 1322–1323, the following are also necessary: *a*) that the subject have been baptized in the Catholic Church or received therein (c. 11); *b*) that, under c. 1330, the act of apostasy must have been perceived by someone. It is insufficient to have a merely internal desire or attitude, with no external transcendence. That would be a case of the *sin* of apostasy and, regardless of whether or not an offense was verified, a rupture of full communion with the Church would be involved (cf. c. 205).

b) *Heresy*

Heresy is the obstinate denial or doubt, after baptism, of a truth that must be believed by divine and Catholic faith. These are the terms used in c. 751 to define the sin of heresy[18] (cf. c. 750: "Those things are to be

17. Cf. *Comm.* 9 (1977), pp. 319–320.
18. Cf. *S. Th.*, II–II, q. 11, a. 1.

believed by divine and Catholic faith ..."). Given that material assumption, for there to be a consummated offense of heresy, in addition to the elements of grave juridical-penal imputability that are deduced from cc. 1322–1323, the following are also required: *a*) that the subject have been baptized in the Catholic Church or received therein (c. 11); *b*) that, under c. 1330, the act of heresy have been perceived by someone. It would is insufficient to have a merely internal desire or attitude, with no external transcendence. That is a case of the *sin* of heresy and, regardless of whether an offense was verified, a rupture of full communion with the Church would be involved (cf. c. 205).

c) *Schism*

Schism means the withdrawal of submission to the Supreme Pontiff or from communion with the members of the Church subject to him. These are the terms used in c. 751 to define the sin of schism (cf. c. 750: "Those things are to be believed by divine and Catholic faith ..."). Given that material assumption, for there to be a consummated offense of schism, in addition to the elements of grave juridical-penal imputability that are deduced from cc. 1322–1323, the following are also required: *a*) that the subject have been baptized in the Catholic Church or received therein (c. 11), which excludes those baptized or brought up in separate ecclesial Communities;[19] *b*) that, under c. 1330, the act of schism have been perceived by someone. It is insufficient to have a merely internal desire or attitude, with no external manifestation. That is a case of the *sin* of schism and, regardless of whether an offense was verified, a rupture of full communion with the Church would be involved (cf. c. 205).

Under c. 751, the offense of schism may be committed in two ways, by refusing to submit to the authority of the Pope as the visible head of the Church or by refusing to commune with the members of the Church subject to him. Although they can ultimately be combined due to their reciprocal ecclesial implications, both should be kept in mind in the description of the offense by the legislator.

The first way should be clearly distinguished from disobedience (cf. cc. 1371–1372, insofar as a disobedient attitude may fit into the cases therein designated). Disobedience assumes the recognition of authority, whereas schism denies the authority. In addition, for the purpose of identifying the offense, "the authority spoken of here is the papal authority, not the temporal head of the Vatican State nor of lesser Ordinaries, although it

19. Cf. *UR* 3; DE/1967 II, 19; The *Directorium Oecumenicum noviter compositum*, March 25, 93 does not expressly mention the topic, but it assumes the doctrinal principles of DE/1967, 10, and one can indirectly deduce what is established for those who wish to be received into full communion with the Church from the other Church or ecclesial Community (cf. DE/1993, 10 and 99).

is the Ordinary proper."[20] In the latter cases, refusal to submit does not constitute schism.

With respect to the second way of committing schism, it is worth pointing out a case not always sufficiently taken into consideration by commentators. That is when there is flagrant denial of communion with the faithful subject to the Pope, both as individual members and collectively. That constitutes a schismatic attitude and may therefore constitute an offense. It vividly expresses the reality of the unique ecclesial *communio* and seems not to be considered with sufficient emphasis. Denying communion with members of the Church subject to the Roman Pontiff is ultimately to deny unity and subjection to the Roman Pontiff, for *communio* is one and unique, and it is broken when it is denied to someone that truly is a member of it.

III. PENALTIES FOR THE OFFENSES OF HERESY, APOSTASY, AND SCHISM

1. *Automatic excommunication* (§ 1)

Anyone committing any of these three offenses incurs a censure of excommunication *latae sententiae* (cf. cc. 1314 and 1331).[21]

The reference in the canon to the provisions of c. 194 § 1,2° refers to cases where, at the time of committing an offense, the offender holds an ecclesiastical office (cf. c. 145), since "one who has publicly defected from the Catholic faith or from communion with the Church" is *ipso iure* removed from the ecclesiastical office. This is not a new penalty. The legislator merely reaffirms (*firmo praescripto*) that the provision of c. 194 § 1,2° is still in effect. Removal from office under canon 194 occurs *ipso iure* because of the *fact* of public defection from the Catholic faith or from communion with the Church, not *ex delicto*. Therefore, in cases where there is no offense due to lack of any of the essential requirements (particularly for not fulfilling the condition in c. 1330), removal takes place nevertheless.

It must, however, be noted that, besides this provision in the *CIC* for automatic application, the problem arises that was mentioned above concerning the method of incurring the penalty. Establishing an automatic penalty in c. 1364 does not appear sufficient for removal from office to be

20. T. GARCÍA BARBERENA, in *Comentarios al Código de Derecho Canónico*, IV (Madrid 1964), p. 457, note 15.

21. The *CCEO* punishes these delicts with the penalty of greater excommunication (which is the same as the excommunication of the *CIC*) but *ferendae sententiae* (cf. cc. 1346 § 1 and 1347). In the *CCEO*, there are no punishments *latae sententiae*.

considered to have operated before the law and for it be urged under c. 194 § 2. As Arrieta comments, what is required is "some grade of intervention of the ecclesiastical authority so that the removal has full juridical efficacy .... The act is declarative, and is made necessary, not to bring about the vacation of the office, but rather so that the removal can be juridically demanded (also the effects of c. 1381 § 2), and consequently it can bring to an end the conferral of office to a new titular (cf. c. 154)."[22] This act is only declarative, which is not the same as imposing a penalty, but which in any case is necessary for the law. It could have been eliminated if the penalty had been *ferendae sententiae*, because the sentence or decree that imposes the penalty would serve as the juridical foundation for considering removal from office and the new provision. Thus, the mention of the canon ("firmo praescripto can. 194 § 1, n. 2") means that the effect is produced *ipso iure*, not by virtue of the penalty. This, however, does not eliminate the need for a declarative act by the authority, without which the vacant office cannot be filled (cf. c. 194 § 2).

2. *Other penalties* (§§ 1 and 2)

a) In addition to *latae sententiae* excommunication, if the heretic, apostate or schismatic is a cleric (cf. c. 207), certain facultative *ferendae sententiae* penalties are established. They are the expiatory penalties listed in c. 1336 § 1,1°–3°. Although c. 1336 § 1 introduces the list of penalties with an open clause ("Apart from others which the law may perhaps establish"), the express mention of nos. 1°–3° should be interpreted specifically. In other words, the penalties include only prohibition or mandate of residence, deprivation of or prohibition against exercising power, office (superfluous considering c. 194 § 1,2°), function, right, privilege, faculty, favor, title or insignia.

b) In addition to excommunication, in where the offender maintains an attitude of continued contumacy (cf. c. 1347 § 2) or if the scandal is particularly grave:

— For any member of the faithful, indeterminate *ferendae sententiae* facultative penalties are established (cf. cc. 1343 and 1349 for the criteria that the judge or superior must follow).

— For the clergy, these penalties may include expulsion from the clerical state (expressly mentioned because under c. 1349, if the penalty is indeterminate and the law does not provide otherwise, perpetual penalties cannot be imposed). For this case, see cc. 291–293 and 1350 § 2.

22. J.I. ARRIETA, commentary on c. 194, in *Pamplona Com.*

3. *Other juridical consequences derived from the offenses of apostasy, heresy, or schism*

Although they are not strictly penal in nature, the cases under consideration, in addition to the express allusion in the canon to *ipso iure* removal from office, also affect the denial of church funeral rites ("to notorious apostates, heretics and schismatics," c. 1184 § 1,1°). They constitute irregularity for receiving orders ("one who has committed the offense of apostasy, heresy or schism," c. 1041,2°) and, in the case of religious, they cause *ipso facto* expulsion from the institute (anyone who "has notoriously defected from the Catholic faith," c. 694 § 1,1°).

1365 Reus vetitae communicationis in sacris iusta poena puniatur.

One who is guilty of prohibited participation in religious rites is to be punished with a just penalty.

SOURCES: cc. 1258, 2316; *UR* 8; DE/1967 38, 42–63

CROSS REFERENCES: cc. 844, 861 § 2, 908, 993, 1124–1129, 1344

COMMENTARY

Ángel Marzoa

1. *Introduction*

Communicatio in sacris is "participation in liturgical worship or administering the sacraments by persons belonging to different religious confessions that are not in full communion."[1] Since it "harms the unity of the Church or involves formal acceptance of error or the danger of aberration in the faith, of scandal and indifferentism," *communicatio in sacris* is prohibited by divine law (*OE* 26).

Nevertheless, "in spite of serious differences which impede full ecclesial communion, it is clear that all who are incorporated into Christ by baptism share many elements of Christian life. There is among Christians, then, a real communion which, though imperfect can be expressed in many forms including the sharing of prayer and liturgical cult" (DE/1993, 104 a).

Setting aside the danger of harm alluded to by *Orientalium Ecclesiarum* 26, *communicatio* is possible, but the following must be taken into account: "the sharing of activities and spiritual recourses must reflect these two facts: 1) the real communion in the life of the Spirit which already exists between Christians and which is expressed in their prayer and in the liturgical cult; 2) the incomplete nature of this communion, because of differences of faith and of ways of thinking that are incompatible with the unrestricted sharing of the spiritual gifts" (DE/1993, 104 c). Hence the need for norms to regulate *communicatio*: "Faithfulness to this complex reality makes it necessary to establish norms on the spiritual sharing, taking into account the diversity of ecclesial that exist between Churches

1. E. TEJERO, commentary on c. 844, in *Pamplona Com.*

and ecclesial Communities implied in it, such that Christians appreciate their common spiritual riches and enjoy them, but also call their attention to the need to surmount the divisions that still exist" (DE/1993, 104 d).

In light of these references, the Catholic Church's prescriptions for *communicatio in sacris* are notably different from the norms in *CIC*/1917. In contrast to the absolute prohibition stipulated in *CIC*/1917 (cf. cc. 1258, 2316, 2319 § 1,1°),[2] there are cc. 933 (celebrating the Eucharist in a non-Catholic church), 844 (administering and receiving the sacraments of penance, the Eucharist and anointing of the sick), 1127 § 1 (mixed marriage before an orthodox sacred minister), and 1183 § 3 (celebrating ecclesiastic funeral rites). However, the strict prohibition against concelebration of the Eucharist, in conformance with c. 908, remains in force.

Finally, it is worth noting that the contents of this canon were not in previous schemata.[3] As Nigro points out, perhaps it was the lack of due prudence, required by the DE/1967, but not always followed, that led to abuses and suggested checking them by introducing the contents of this canon into the final text.[4]

2. *Offences*

The legislator deemed it best that the preceptive penalties provided for this type of offense should be determined by the prudent judgment of the superior or judge. Providing references to the norms on *communicatio* is sufficient, with no apparent need to treat individual specific types of behavior separately. That is a task for the judge or superior.

As noted above, *communicatio in sacris* involves participating in liturgical worship or administering the sacraments.

a) Different canons establish regulations for *communicatio in sacramentis*. In perhaps the clearest and most universal case of an act that leads to an offense, c. 908 strictly prohibits concelebration of the Eucharist with priests or ministers of churches or ecclesial communities not in full communion with the Church (cf. DE/1993, 104 e). In a general way, c. 861 § 2 regulates the administration of baptism in cases of necessity (cf. DE/1993, 92ff.); cc. 1124–1129 regulate mixed marriages (cf. DE/1993, 143 ff.); and c. 844 establishes the rules for *communicatio in sacris* in all other cases.

2. The punishment of c. 2319 § 1,1° (excommunication for marriage before a non-Catholic minister) had already been abolished, March 18, 1966: cf. *AAS* 58 (1966), p. 238.

3. It is not in the *Schema* of 1973. It appears for the first time in the *Schema* of 1980 as c. 1317, in the same terms as the present canon.

4. Cf. F. NIGRO, *Commento al Codice di Diritto Canonico* (Rome 1985), p. 801.

b) With respect to other dimensions of *communicatio in sacris*, the *CIC* did not treat them specifically: "melius est ut Codex de re sileat et Apostolica Sedes normas det circumstantiis aptatas."[5]

3. *Penalties*

A preceptive but indeterminate penalty is established. The judge or superior must in each case, and with regard to the circumstances, evaluate whether the unity of the Church is harmed, whether the behavior implies formal adhesion to aberration or danger of aberration in the faith, and to what degree scandal or inducement to ideas of indifferentism may be caused (cf. *OE* 26). In determining the penalty, the judge or superior must take into account the criteria established in the general norms involved, especially cc. 1344, 1347, 1349, 1350.

5. *Comm.* 15 (1983), p. 198. In the commentary on c. 844 (note 5), reference is made to specific directives of SPCU in this regard.

1366 Parentes vel parentum locum tenentes, qui liberos in religione acatholica baptizandos vel educandos tradunt, censura aliave iusta poena puniantur.

Parents, and those taking the place of parents, who hand over their children to be baptized or brought up in a non-Catholic religion, are to be punished with a censure or other just penalty.

SOURCES: c. 2319 § 1,3° et 4°; *MM* 15

CROSS REFERENCES: cc. 96, 226 § 2, 751, 793–795, 798, 799, 804, 867, 868, 1136, 1055 § 1

COMMENTARY

Javier Escrivá Ivars

Under the heading "Offences Against Religion and the Unity of the Church," the legislator penally sanctions the behavior of parents or those taking their place (meaning anyone who is lawfully or *de facto* charged with rearing a minor, especially adoptive parents, tutors and family counsel) if they hand over a child to be baptized or brought up in a non-Catholic religion.

There are three types of behavior named in c. 1366; therefore, there are three possibilities of incurring in this offense:

— handing over a child to be baptized in a non-Catholic religion

— handing over a child to be brought up in a non-Catholic religion

— handing over a child to baptized and brought up in a non-Catholic religion

I. Handing over a child to be baptized in a non-Catholic religion

A. *Active subject of the offense*

The active subjects of this offense are parents or those who take their place. In contrast to c. 2139, 3° of *CIC*/1917, c. 1366 does not speak of the parents' own children; therefore, the mother and father are not the

only ones who can commit this offense. The text of the canon also expressly indicates that those who take the place of parents for a child may be actors in the offense. This includes a minor's tutor or guardian, adoptive parents, family counsel, or anyone else who might have exclusive care or custody of a minor.

B. *Elements of the offense*

The elements of the offense are: 1) baptizing a child in a non-Catholic religion; and 2) the will of the parents or those who take their place to hand over the child to be baptized in a non-Catholic religion.

1. *Baptism of a child in a non-Catholic religion*

The first element is the non-Catholic baptism of the child. It is insufficient to put the child in a position to be baptized in a non-Catholic religion; without baptism, there is no offense. There must have been an act performed directed specifically toward causing the child to be baptized. Other acts, even if related to the proposed baptism, do not violate c. 1366, unless they include the initiation of performing baptism.

Between the act directed towards non-Catholic baptism of the child and the actual baptism, there must be a relationship of cause and effect, a relationship of material causality. The means used by the active subject of the offense to perform the act may be of various types, but they must be directed toward causing non-Catholic baptism. The acts may be ones of commission or omission. For example, a father who directly causes a child's baptism in a non-Catholic religion is as guilty as a father who has a moral, social or legal duty to help and protect the minor, who cannot make decisions for himself, and fails to do so because he wants the child to enter a non-Catholic religion.

2. *Will to baptize outside of the Catholic religion*

The second element of this offense is the will to baptize outside of the Catholic religion. Malice must be present—the intention to baptize the child outside the Catholic religion. Since the will is an internal phenomenon, external acts that reveal the internal intention must be considered. The person's intention to baptize the child outside the Catholic religion must be clear and obvious.

Acts that are preparatory for baptism are not punishable, since they are not the beginning of performance of the act. The offense is consummated with the actual baptism of a child outside the Catholic religion. The length of time between the act of handing the child over for baptism,

which is a manifestation of the will of the parents or those taking their place that the child be baptized in a non-Catholic religion, and the actual baptism is irrelevant, as long as there is a causal relationship.

C. *Penal sanction*

The preceptive penalty is *ferendae sententiae*: censure or other just penalty. In each case, the judge must study the objective gravity of the offense to impose the proper penalty.

II. HANDING OVER A CHILD TO BE RAISED IN A NON-CATHOLIC RELIGION

A. *Active subject of this offense*

The parents or those taking their place are the active subjects. Similar to c. 2319,4° of *CIC*/1917, c. 1366 does not limit the action of the subject to his or her own child. Therefore, either parent may commit this offense with his or her child, and those taking the parents' place can also be active subjects of this offense.

B. *Elements of this offense*

The elements of the offense are: 1) handing over a child to be brought up in a non-Catholic religion; and 2) the will of the parents or those taking their place to hand over a child to be brought up in a non-Catholic religion.

1. *Handing over of a child to be raised in a non-Catholic religion*

In contrast to c. 2319,4° of *CIC*/1917, c. 1366 makes no distinction between educating and raising a child in a non-Catholic religion. Raising a child covers formation of the whole personality; therefore, it is therefore broader than the concept of education, which it undoubtedly includes.

It is both the duty and the right of parents to bring up their children. This is a primordial right, with roots in the calling of husband and wife to participate in God's creative work. The scope and content of the parents' duty and right to bring up their children covers all areas of forming the children's personalities, for example, religious education, education in human, intellectual and moral values, and the freedom to choose their children's institutions of learning and school programs. In sum, this duty and right of the parents to bring up their children must be deemed to be a

true mission and as such, it commits the parents to a most grave obligation. However, it does not follow that the duty and right of the parent is absolute or despotic; it is inseparably bound to natural and divine law. To summarize, all parents' duties and rights to bring up their children should be ordered toward participation in God's creative work.

Parents or those taking their place who hand children over to a non-Catholic religion or to teachers to be educated in impiousness, false beliefs or non-Catholic religion, falsify the formative mission that the family has been given from the Creator. They also defraud the Church of the educational mission it holds by divine mandate, and rob the child of its right to be brought up in the faith in which it was baptized.

2. *Will to bring up children in a non-Catholic religion*

The second element of this offense is the will of the parents or those taking their place for the child to be brought up outside the Catholic religion. Malice is required—the intention to bring up the child outside the Catholic religion. The intention of obtaining that education may be manifested either expressly or tacitly. The means used to bring up the child outside the Catholic religion may consist of acts of commission or omission. Therefore, for example, the following commit the offense: a father who purposely hands over his child to a non-Catholic religion to be brought up; a father who puts his child in a position to receive formation in a non-Catholic religion; and a father who receives notice of the non-Catholic formation of his child and could easily prevent it, but does nothing to avoid it.

While it is the parents' right to choose education institutions for their children, this does not discharge the parents from responsibility in bringing them up. Since choosing an educational institution that is not specifically Catholic is permitted with due caution (such as non-religious schools, public schools, private schools, non-Catholic religious schools), parents and those taking their place have the inexcusable obligation to oversee the formation that their children receive in the institution where they pursue academic training.

C. *Penal sanction*

The preceptive *ferendae sententiae* penalty is censure or other just penalty. In each case, the judge must study the objective gravity of the offense to impose the proper penalty.

III. Handing over a child to be baptized and brought up in a non-Catholic religion

The active subjects, the elements of the offense and the penalty provided are the same as for the other two types of offense under this canon. In all three acts that constitute the offense penalized by the legislator in c. 1366, the common element is communication with non-Catholics in sacred matters. This attacks the religion and unity of the Church; it is also a grave violation of the duty of Catholics to baptize and bring up their children in the Catholic faith and to keep the family from danger to their faith.

The obligation of parents to have their children baptized as soon as possible (cf. c. 867) continues, because there is no reason that exempts parents from this duty, which is based on the need for baptism to obtain eternal life and salvation.

Baptism, a sacrament instituted by Christ, confers the grace of regeneration. To attain this supernatural reality, the legislator is careful to emphasize three aspects of baptism: *a*) it is the door and foundation of the sacraments; *b*) receiving it actually or at least in intention is necessary in order to be saved; and *c*) it is conferred validly only by ablution with real, natural water in the prescribed verbal form. Saying that baptism is the door to and foundation of the other sacraments clearly signifies that it opens the way to, and sets the foundation for, valid reception of the other sacramental means inherited from Christ for sanctification in this life and future glorification in heaven. When parents give life to their children, they assume the responsibility for telling them about the meaning, value and hope included in the gift of life that is renewed from generation to generation through baptism.

Within the Church, the family is the natural medium through which new lives are to be regenerated by baptism. It is the duty of Christian parents to have their children purified and regenerated by sacramental washing so they may become members of the Mystical Body. This perspective gives the declarations of Vatican Council II a richer significance: "Without intending to underestimate the other ends of marriage, it must be said that true married love and the whole structure of family life which results from it are directed to disposing the spouses to cooperate valiantly with the love of the Creator and Savior, who through them will increase and enrich his family from day to day. Married couples should regard it as their proper mission to transmit human life and to educate their children; they should realize that they are thereby cooperating with the love of God the Creator and are, in a certain sense, its interpreters" (*GS* 50).

According to the OBP, a Christian family's baptismal responsibilities are governed by two principles: the ecclesiality of baptism and the ecclesiality of the family.

The ecclesiality of baptism carries three assumptions: *a)* the Church received the mission to evangelize and baptize all men; it can and should baptize children born to Christian families; *b*) the Church baptizes children in its own faith, not in the faith of the children or their parents and godparents; *c)* baptism adds to the Church, the people of God, and to the Mystical Body, represented in the parents, godparents, and faithful Christians who participate in the ministry of baptism. The Church's solicitude for baptism derives from those principles.

The baptismal responsibility of the family is derived from its ecclesiological position, which has the following fundamental traits: *a*) Christian parents, like all baptized persons, are called to sanctity in their own condition; *b*) one part of their specific mission in the Church when God grants them children is bringing up their children in the faith; *c*) just as procreation does not belong to either parent alone, but is the fruit of the love of both, the consequent bringing up of the children up in the faith, is the task of both parents. Parents who have been blessed by God with the birth of a new being must feel a sense of urgency from their baptismal priesthood and Christian paternity to ask that their child be baptized in the Church.

1367 **Qui species consecratas abicit aut in sacrilegum finem abducit vel retinet, in excommunicationem latae sententiae Sedi Apostolicae reservatam incurrit; clericus praeterea alia poena, non exclusa dimissione e statu clericali, puniri potest.**

One who throws away the consecrated species or, for a sacrilegious purpose, takes them away or keeps them, incurs a *latae sententiae* excommunication reserved to the Apostolic See; a cleric, moreover, may be punished with some other penalty, not excluding dismissal from the clerical state.

SOURCES: c. 2320; SCHO Decr. *Cum ex expresso*, 21 iul. 1934 (*AAS* 26 [1934] 550)

CROSS REFERENCES: cc. 899, 900, 924, 1331 § 1

COMMENTARY

Alphonse Borras

1. This canon deals with the offense of profanation of the consecrated Eucharistic species of bread and wine (cc. 899, 900, 924). The canon refers to species consecrated during the Eucharistic *synaxis* that remain on the altar, as well as to those in the tabernacle or on display for Eucharistic adoration. The offense could be called profanation of the *sacred species*, but it does not seem suitable to speak of profanation of the Eucharist. Such a name would be imprecise since, strictly speaking (c. 18), what is profaned is the species consecrated in the Eucharist, not the celebration of the sacrament.

This canon includes the substance of c. 2320 of *CIC*/1917, which provided for *latae sententiae* excommunication. Before that time, a person who profaned the consecrated species was not punished with excommunication but was handed over to the secular arm of the law, which often inflicted capital punishment upon the offender. Profanation of the consecrated species was closely associated with magic and superstitious practices.[1]

Current legislation introduces four modifications to *CIC*/1917. First, c. 1367 does not speak of suspected heresy, which has disappeared from *CIC*. Second, there is no mention of the infamy incurred *ipso facto*. Infamy

1. Cf. the sources of c. 2320 *CIC*/1917, as well as the historical report of F.X. WERNZ-P. VIDAL, *Ius Canonicum*, t. 7, *Ius Poenale ecclesiasticum*, 2nd ed. (Rome 1951), pp. 478–479.

in law or in fact is no longer a vindictive penalty, and it is completely absent from the present Code. Third, the excommunication incurred is simply reserved to the Holy See, not "most especially reserved," since this type of reservation is completely abrogated in the present Code. During the preparatory work, in spite of suggestions from bodies consulted, the different *Schemata* did not provide for reserved excommunication, but the promulgated text retained it. Finally, whereas previously there was a preventive disposition for the clergy, now there is only the possibility of dismissal from the clerical state. Just as in the preparatory *Schemata*, the final canon has retained the provision of facultative penalties for clerics.[2]

2. The offense of profanation of the consecrated species is presented in three forms. The first consists of throwing away the consecrated species (*abicere species consacratas*). Canonical doctrine includes in this category the act of scornfully throwing away consecrated hosts or scornfully pouring the Sacred Blood on the ground or the altar. The malice (*dolus*) proper to the offense lies precisely in scorn. Therefore, this offense cannot be imputed to someone who empties a ciborium or monstrance to steal it and leaves the hosts in the tabernacle. In such a case, the thief is not showing scorn toward the species consecrated in the Eucharist.

The other two forms of the offense consist in taking away the consecrated species or keeping them for a sacrilegious purpose ("abducere vel retinere in finem sacrilegum"). The simple act of taking the consecrated species away or keeping them does not constitute the offense; it is the purpose in committing the acts, the sacrilege, which determines the offense. For example, someone might take away the Eucharistic reserves in case of natural catastrophe or imminent destruction of the church, or keep it in his home to avoid the risk of profanation. The fact of keeping the consecrated hosts at home or taking them away, even though it is prohibited (c. 935), does not constitute an offense in the terms of this canon, because there is no sacrilegious intention.

There is a question as to whether the first form, *abicere*, includes a sacrilegious purpose. In fact, scornfully throwing away the consecrated species implies sacrilege. In classical terms, this is a *real* sacrilege, that is, profanation of a *thing* that is sacred by virtue of divine institution, in this case by a sacrament. It is preferable to avoid such reifying language and say that, in the first form in this canon, sacrilege is none other than irreverent and blasphemous scorn of the consecrated species, or also, without pleonasm, scorn of the sacrament.

Whatever its form, the offense implies a grave sin against God or, using classical terminology, against the virtue of religion. The malice proper to the offense lies in the scorn with which the sacred species is treated and the sacrilegious purpose in taking them away or keeping them.

2. *Comm.* 9 (1977), p. 306.

A Catholic who voluntarily and deliberately acts in such a manner and with such an intention commits a grave offense toward Christ, who gives himself in his Eucharistic Body. That person also mocks Christ's Sacrifice on the Cross and in his personal Body, and tramples on the nourishment that is vital to the Mystical Body. It is understandable why previously this offense could lead to the suspicion of heresy and cause infamy.

3. The penal sanction provided by the canon is *latae sententiae* excommunication reserved to the Apostolic See. If the offender is a cleric, he may also be punished with another indeterminate and facultative penalty. The legislator does not exclude imposition of the gravest penalty, dismissal from the clerical state; in fact, he expressly indicates it.

Finally, the offense of profanation of the consecrated species may be occult or public. If it is public, divulging the offense adds to the grave offense toward God and great scandal to the ecclesial community, but it does not increase the penal sanction.

1368 Si quis, asserens vel promittens aliquid coram ecclesiastica auctoritate, periurium committit, iusta poena puniatur.

A person who, in asserting or promising something before an ecclesiastical authority, commits perjury, is to be punished with a just penalty.

SOURCES: cc. 1743 § 3, 1755 § 3, 1794, 2323

CROSS REFERENCES: cc. 1199, 1200 (876, 1068, 1358, 1562), 1344, 1347, 1349, 1350

COMMENTARY

Ángel Marzoa

1. *Offense*

Perjury is the violation of an oath. It is *assertive* if the oath is falsely sworn, and it is *promissory* if what is promised under oath is not fulfilled. Perjury is also promissory if a promise is made under oath without the intention to fulfill it, but inasmuch as there is no contrary behavior, this exception is irrelevant for the law (cf. cc. 1199 and 1200, respectively).

Whereas *CIC*/1917 contained separate canons on perjury, depending on whether it was judicial (cf. cc. 1743 § 3, 1745 § 3, 1794) or extra-judicial (c. 2323), this canon includes all cases in a single penal norm.

Although the terms of the designation are broad ("in asserting or promising something before an ecclesiastical authority"), the offense is committed when the law requires an *ad casum* oath (for example, cc. 876, 1068, 1532, 1562) or when the authority exceptionally requires an oath for a specific act, but not in cases of failure to fulfill a duty after making a preceptive oath before taking office.[1]

2. *Penalties*

A preceptive *ferendae sententiae* penalty is established (*puniatur*), but it is indeterminate (*iusta poena*). To determine the penalty, the judge or superior must take into account the criteria established in the general norms on the matter, especially cc. 1344, 1347, 1349, 1350.

1. Cf. T. GARCÍA BARBERENA, in *Comentarios al Código de Derecho Canónico*, IV (Madrid 1964), p. 466, who, in turn, relies on A. VERMEERSCH-I. CREUSEN, *Epitome Iuris canonici*, vol. 3 (Brussels 1956), no. 523.

1369 **Qui in publico spectaculo vel concione, vel in scripto publice evulgato, vel aliter instrumentis communicationis socialis utens, blasphemiam profert, aut bonos mores graviter laedit, aut in religionem vel Ecclesiam iniurias exprimit vel odium contemptumve excitat, iusta poena puniatur.**

A person is to be punished with a just penalty, who, at a public event or assembly, or in a published writing, or by otherwise using the means of social communication, utters blasphemy, or gravely harms public morals, or rails at or excites hatred of or contempt for religion or the Church.

SOURCES: cc. 2323, 2344

CROSS-REFERENCES: cc. 822–832, 1344, 1347, 1349–1350

COMMENTARY

Ángel Marzoa

1. *Offenses*

Canons 822–832 regulates matters concerning "the means of social communication and books in particular," as phrased in the heading for tit. IV of book III, which contains these canons. This set of norms is the basic reference for the offenses dealt with in c. 1369, especially regarding the obligation of pastors to exercise the "officium et ius invigilandi" so as to preserve the integrity of the truths of faith and morals (cf. c. 823 § 1; see commentary).

To establish the components of these kinds of offenses, the elements that must be present according to the canon's text should be taken into account:

a) Channels of communication: public events or assemblies; published writing (books, pamphlets, flyers, etc., published *de facto*); means of communication in general (television, radio, press, electronic mail, etc.).

b) Material content: blasphemy (word or act with the intention to curse or slander God, directly or through slandering the Virgin or the saints); grave attacks on morals (spreading immoral doctrine or performing gravely immoral acts); slandering religion or the Church; inciting hatred of or scorn for religion or the Church.

The fact that writings must be "divulged" has the same *ratio* here as in the text of c. 1330. Whereas in the cases in the other canons, divulgence is deduced from their very nature, writings, because others may receive them, need divulgence. Strictly speaking, such precision in the text is unnecessary (an occult writing cannot be the element of an offense because it lacks otherness) but since it clarifies, it is not *de trop*.

2. *Penalties*

A preceptive *ferendae sententiae* (*puniatur*) but indeterminate (*iusta poena*) penalty is established. The preceptive nature of the penalty must be evaluated in connection with the *officium invigilandi* to which c. 823 refers. The indeterminate nature of the penalty is due to the different degrees of gravity to which this type of offenses may give rise. To determine the penalty, the judge or superior must take into account the criteria established in the general norms on the matter, especially cc. 1344, 1347, 1349, 1350.

TITULUS II
De delictis contra ecclesiasticas auctoritates et Ecclesiae libertatem

TITLE II
Offenses Against Church Authorities and the Freedom of the Church

1370 **§ 1. Qui vim physicam in Romanum Pontificem adhibet, in excommunicationem latae sententiae Sedi Apostolicae reservatam incurrit, cui, si clericus sit, alia poena, non exclusa dimissione e statu clericali, pro delicti gravitate addi potest.**

§ 2. Qui id agit in eum qui episcopali charactere pollet, in interdictum latae sententiae et, si sit clericus, etiam in suspensionem latae sententiae incurrit.

§ 3. Qui vim physicam in clericum vel religiosum adhibet in fidei vel Ecclesiae vel ecclesiasticae potestatis vel ministerii contemptum, iusta poena puniatur.

§ 1. A person who uses physical force against the Roman Pontiff incurs a *latae sententiae* excommunication reserved to the Apostolic See; if the offender is a cleric, another penalty, not excluding dismissal from the clerical state, may be added according to the gravity of the crime.

§ 2. One who does this against a bishop incurs a *latae sententiae* interdict and, if a cleric, he incurs also a *latae sententiae* suspension.

§ 3. A person who uses physical force against a cleric or religious out of contempt for the faith, or the Church, or ecclesiastical authority or the ministry, is to be punished with a just penalty.

SOURCES: § 1: c. 2343 § 1; SCHO Decr. *Cum ex expresso,* 21 iul. 1934 (*AAS* 26 [1934] 550)
§ 2: c. 2343 § 3
§ 3: c. 2343 § 4

CROSS REFERENCES: cc. 1331 § 1, 1334 § 2, 1369, 1397

COMMENTARY

Alphonse Borras

1. This canon deals with the offense of violence, to "use physical force against someone" ("vim physicam adhibere in aliquem"). This expression refers to a physical attack (*iniuria realis*), not a verbal attack (*iniuria verbalis*), which is treated in c. 1369. Physical force may affect bodily integrity if it is manifested with blows, injuries or the intention to kill. It may affect personal liberty if it takes place during detention or imprisonment. Finally, it may affect a person's dignity, if he is deprived of it, if his reputation is harmed, or if he is subjected to torture. Physical force must be external, but the offense is not always public; it may very well be occult, in other words, not publicly known.

The three paragraphs consider physical force against the Pope (§ 1), bishops, (§ 2) and clerics and religious (§ 3). The penal sanction provided in each case is different. It can be increased if the offender is a cleric (cf. §§ 1 and 2).

Following a centuries-old canonical tradition, c. 2343 of *CIC*/1917 used a typical expression to designate physical force against ecclesiastics: *violentas manus iniecere*. This expression goes back to c. 15 of Lateran Council II in 1139, translated as follows: "In the same way we have decided to legislate that if anyone, at the instigation of the devil, incurs the guilt of the following sacrilege, that is, to lay violent hands on a cleric or a monk ("in clericum vel monachum violentas manus iniecerit"), he is to be subject to the bond of anathema; and let no bishop presume to absolve such a person unless he is in immediate danger of death, until he has been presented before the Pope and submits to his mandates ..."[1] As can be seen, c. 15 of Lateran Council II called physical force against clerics and monks *sacrilegio*. Canon 15 also gave a name to one of the personal immunities enjoyed by clerics, the so-called *privilege of the canon*. The personal immunity of clerics was maintained until the Constitution *Apostolicae Sedis* of 1869 and *CIC*/1917.[2] In *CIC*/1917, c. 119 announced the obligation of all the faithful to pay due respect to clerics according to their rank and office, and designated any physical force against them (*iniuria realis*) as *sacrilegio* (cf. c. 2343).

The provisions of c. 1370 are no longer justified for defending the privilege of the canon or as a punishment for a sacrilege. The privilege of the canon is now abrogated, and the other privileges belonging to clerics

1. This canon was included in the *Decretum Gratiani*: *C* 17, q. 4, c. 29.
2. Some bibliographic references can be found in A BORRAS, *L'excommunication dans le nouveau code de droit canonique. Essai de définition* (Paris 1987), pp. 53–54; cf. notes 105–108.

are not mentioned in the current Code (cf. *CIC*/1917, cc. 118–123). This is the legislative consequence of the conciliar declaration on style of life for presbyters: "Priests, in common with all who have been reborn in the font of baptism, are brothers among brothers as members of the same Body of Christ which all are commanded to build up" (*PO* 9; for bishops, cf. *LG* 27, which cites Mt 20:28, Mark 10:45 and John 10:11; for deacons, *LG* 29, which cites Saint Polycarp). Furthermore, the Code affirms equality among all Christians in dignity and action (c. 208; cf. *LG* 32). This equality is founded on baptismal regeneration. Because of this fundamental equality, the baptized cooperate with one other, each according to his condition and function, to build up the Body of Christ.

Abrogation of the privilege of the canon carries with it the disappearance of the word "sacrilege" as a term for physical force against clerics. Who still speaks of sacrilege to the person of a cleric or profanation of a holy person? Furthermore, who are holy persons? Are they only clerics, or all Christians signed by baptism and confirmation and permanent guests at the Eucharistic table? All baptized persons are called to work according to sanctity that comes from God (2 Cor 1:12). *Everyone* is included *together* under this heading—the holy nation, the actual priesthood, the holy temple (1 Pet 2:9; Eph 2:21)—to offer themselves with Christ in holy sacrifice unto God (Rom 12:1; 15:16; Phil 2:17).

If there is no longer any privilege to defend or sacrilege to punish, what is the reason for the penal sanctions established for offenses against the persons named in this canon? In our opinion, there are two reasons. The first is spelled out in § 3 of the canon: the author of physical force against clerics or religious is prosecuted because he has acted out of "contempt for the faith, the Church and ecclesiastical or ministerial powers." That reason is explicit in the third paragraph; it is implied in the first two paragraphs, which treat physical force against the Pope and bishops. According to this argument "a minori ad maius," the physical force punished in the canon is that which results from an expression of contempt for the faith, the Church or the ministry.

The second reason is expressed in the preparatory work on the Code: the public good of the Church.[3] The public good would be exposed to grave diminishment in the case of physical force against the Pope because of what he represents by virtue of his primacy in the College of Bishops and his supreme, full, immediate and universal power over the entire Church. The public good would also be placed in danger in cases of physical force against a bishop, because of what his ministry represents when exercised in the service of a particular church and in his care for all Churches. The same may be said, *mutatis mutandis*, for physical force against other clerics and religious because ordained ministers represent

3. *Comm.* 9 (1977), pp. 306–307.

the Church through their public function, and religious, through their canonical state, reveal an eminent gift for the Church's mission (c. 574; cf. *LG* 44; *PC* 7).

The acts of violence considered in this canon are therefore not simply an attack on the personal integrity of an individual (c. 1397). They are also a *specific* insult to what that person *represents*. The gravity of the penalties established in the canon is understandable from such a point of view, at least for physical force against the Pope and bishops.

2. The offense of physical force against the Pope is punished with *latae sententiae* excommunication reserved to the Apostolic See. The reservation emphasizes the gravity of the offense because of what the Bishop of Rome represents in the College of Bishops and in his ministry in the service of the universal Church. If the offender is a cleric, § 1 provides for the possibility of a facultative indeterminate penalty (*addi potest*), not excluding dismissal from the clerical state. For the legislator, this possibility depends upon the gravity of the offense (*pro delicti gravitate*).

Physical force against a bishop, either diocesan or titular, is punished with *latae sententiae* interdict. Paragraph 2 provides for *latae sententiae* suspension (c. 1334 § 2) if the offender is a cleric. On the other hand, § 3 punishes the offense of physical force against a cleric or religious (or female religious: cf. c. 606) with an indeterminate preceptive penalty, *iusta poena puniatur.*

1371 **Iusta poena puniatur:**

1° qui, praeter casum de quo in can. 1364 § 1, doctrinam a Romano Pontifice vel a Concilio Oecumenico damnatam docet vel doctrinam, de qua in can. 750 § 2 vel in can. 752, pertinaciter respuit, et ab Apostolica Sede vel ab Ordinario admonitus non retractat;

2° qui aliter Sedi Apostolicae, Ordinario, vel Superiori legitime praecipienti vel prohibenti non obtemperat, et posts monitum in inoboedientia persistit.

The following are to be punished with a just penalty:

1° a person who, apart from the case mentioned in Can. 1364 § 1, teaches a doctrine condemned by the Roman Pontiff, or by an Ecumenical Council, or obstinately rejects the teaching mentioned either in can. 750 § 2 or in can. 752 and, when warned by the Apostolic See or by the Ordinary, does not retract;

2° a person who in any other way does not obey the lawful command or prohibition of the Apostolic See or the Ordinary or Superior and, after being warned, persists in disobedience.

SOURCES: cc. 2317, 2331 § 1*

CROSS REFERENCES: § 1: cc. 751–752, 754, 1364
§ 2: cc. 212 § 1, 273, 696 § 1

COMMENTARY

Carlos J. Errázuriz M.

1. *Offenses*

a) *Other offenses against the communion in the faith* (c. 1371,1°)

Apart from the extreme hypotheses of apostasy and heresy (cf. cc. 751, 1364), no. 1° of this canon describes other offenses that involve opposition to the ecclesiastical magisterium: teaching a doctrine condemned by the Roman Pontiff or by an ecumenical council (cf. c. 754); and obstinately rejecting the doctrine described in cc. 750 § 2 and 752. Since

* The text of this canon was amended by John Paul II, with the m.p. *Ad tuendam fidem*, May 18, 1998 (*AAS* 90 [1998], pp. 457-461), which introduced the mention of c. 750 § 2.

the juridical good at stake is communion with the faith, in spite of their placement under this heading, these offenses fall into the category of offenses against the faith.[1] Although not considered by the *CIC*, this question was taken up again by *Pastor bonus* 53 when it established the penal competence of the CDF. Furthermore, the *CCEO* places the parallel offenses in the second paragraph of c. 1436, where § 1 provides for the offenses of apostasy and heresy.

The first of these types is dealt with in similar terms by c. 2317 of *CIC*/1917. As is obvious from the reference to c. 1364 § 1, it is stated that this doctrine should not have been condemned as formally heretical. Instead, it should have been under a different form of doctrinal censure: near to heresy, false, temerarious, scandalous, etc. Reference was made not only to the Roman Pontiff, but also to the Apostolic See, and doctrine hesitated about including condemnations emanating from Roman congregations, especially the Holy Office. Canon 2317 developed from a tradition that only considered cases in which the condemnation was made under express penalty of excommunication.[2]

Although c. 2317 of *CIC*/1917 spoke of "those who teach or defend, in public or in private," and c. 1436 § 2 of the *CCEO* refers to "whoever professes," the current *CIC* uses the verb "to teach" (*docere*). Interpreting this term strictly (cf. c. 18), one author holds that only teachers in schools, especially ecclesiastical institutions, are included, while catechesis and predication are excluded.[3] On the other hand, an author who prefers a broader interpretation notes that spreading certain doctrines through written documents, lectures, and the ministry of the word can be more harmful than doctrine coming from a teacher's podium.[4] In any case, there are insufficient reasons to reduce teaching to school teaching. "To teach is to show a doctrine to someone who does not know it, with the implicit suggestion that it be accepted. It is not, therefore, merely the expression of one's own opinion or evidence that said doctrine is not condemned, etc."[5]

Together with this traditional offense, and perhaps because it has become less operative to the degree that recourse to condemnations is now less frequent in the magisterium, the *CIC* (but not the *CCEO*) originally described another offense that consisted in obstinately rejecting the doctrine described in c. 752. This form, at first included in the *iter* of preparing the

1. I have maintained this point in "La protezione giuridico-penale dell'autenticità della fede. Alcune riflessioni sui delitti contra la fede," in *Monitor Ecclesiasticus* 114 (1989), pp. 122ff.

2. Cf. e.g., PIUS IX, Const. *Apostolicae Sedis*, October 12, 1868, § II, 1, I, in P. GASPARRI-I. SEREDI, *Codicis Iuris Canonici Fontes*, vol. III (Rome 1933), no. 552, p. 26.

3. Cf. A. CALABRESE, *Diritto penale canonico*, (Cinisello Balsam-Milan 1990), p. 217.

4. Cf. L. CHIAPPETTA, *Il Codice di Diritto Canonico. Commento giuridico-pastorale*, vol. II (Naples 1988), no. 4486, p. 504.

5. T. GARCÍA BARBERENA, *Comentarios al Código de Derecho Canónico*, vol. IV (Madrid 1964), no. 487, p. 459.

CIC,[6] was later eliminated as too broad.[7] However, it did appear in the published text. Setting aside the questions raised by c. 752, this offense is problematic because it is so broad.[8] In order to avoid any attitude of mistrust or fear with regard to the magisterium of the Church, which must above all be seen as a good for salvation since it serves to guarantee revealed truth, broadening the description of the offenses of doctrinal disobedience seems convincing from the point of view of the effective operation of the canonical penal system. Trying to treat the vast magisterium spoken of in c. 752 with penal techniques runs into an opposite and twofold danger. The offense is transformed into either a theoretical statement or a source of arbitrariness, which, in the current context, seems hypothetical.

What is involved here are teachings where the authentic supreme magisterium is clearly compromised, although there is no twofold requirement of formally belonging to the deposit of the faith and infallibility. This means that the teachings do not enter what is to be believed with divine and catholic faith, the opposite of which is heresy. The harm to the supreme magisterium depends upon the mind and intention of the magisterial authority and is principally manifested in the type of documents used, the frequency with which a doctrine is proposed, and the manner of expression (cf. *LG* 25). Logically, there is a range of hypotheses that depend upon the degree of proximity to the deposit of the faith and the consequent obligatoriness with which any doctrine is proposed, which will influence the proportional determination of the penalty. However, it is often better to apply administrative sanctions more broadly. An example would be withdrawing the mandate to teach theological subjects, or the faculty of preaching, without prejudice to the fact that the sanctions may also be expiatory penalties. These conditions would apply in cases of doctrinal disobedience that, although they may be serious and sufficiently pertinacious, it is doubtful that they constitute an offense proper.

With the *Motu proprio Ad tuendam fidem* of May 18, 1998, a new legal definition of an offense has been added, a definition that consists of obstinate rejection of the doctrine described in c. 750 § 2. This definition is introduced by the same *Motu proprio* where it refers to definitive teachings of the magisterium that, although they are not proposed as divinely revealed, are required to holily protect and faithfully expound the deposit of the faith (that is, within the sphere usually called *de fide tenenda*).The same new offense also has been defined in c. 1436 § 2 of the CCEO. It is undoubtedly from a text that is much more precise that that of c. 752, because it refers especially to when there is a solemn act of the magisterium or an express declaration of the Roman Pontiff regarding the definitive nature of

6. Cf. Code Commission, *Schema documenti quo disciplina sanctionum seu poenarum in Ecclesia Latina denuo ordinatur* (Typis Polyglottis Vaticanis 1973), c. 52,1°.
7. Cf. *Comm.* 9 (1977), p. 308.
8. Thus, J(ohn) BOYLE, "Church Teaching Authority in the 1983 Code," in *The Jurist*, XLV (1985), pp. 160ff.

a doctrine taught by the universal ordinary magisterium. The fact that they are definitive and therefore infallible doctrines (cf. c. 749, where the term *tenendam* has been used on purpose to include them) confers a particular gravity to their obstinate rejection. In accord with c. 750 § 2, the member of the faithful in that situation is opposing the doctrine of the Catholic Church.

b) *Offense of rebellion* (c. 1371,2°)

In terms similar to c. 2331 § 1 of *CIC*/1917, the second offense in this canon refers to types of disobedience towards ecclesiastical authority. However, these offenses do not imply rejection of the Church's authority, which would be schism (cf. cc. 754, 1364).

In contrast to *CIC*/1917, which referred only to acts by the Roman Pontiff or the ordinary proper, the list of authorities has been lengthened in the current *CIC*: the Apostolic See (not just the pope himself), any ordinary (proper or not), provided that he has a relationship with the member of the faithful by virtue of which he may legitimately order him to do or prohibit him from doing something, and any other superior (a term that appeared in the 1982 *Schema*,[9] instead of *moderator*, a word used only to designate the supreme moderator or general superior: cf. c. 622). All religious superiors should be included in the last category, even if they are not ordinaries, but as this conclusion seems excessive, the efforts to hold the opposite are understandable.[10] The mandate or prohibition in a general norm or singular precept—the text does not distinguish between the two—must be legitimate. Legitimacy must be presumed if there is no proof to the contrary. This involves observing the requisites of both substance and form for an act to obligate the faithful. The diversity and extent of obedience in the Church should be kept in mind: obedience of all the faithful to whatever the pastors as rulers of the Church may establish (cf. c. 212 § 1). Apart from other possible types of obedience due to the specific situation of an individual member of the faithful who has assumed certain ecclesial tasks or commitments, obedience is given an intensifier in clerics (cf. c. 213), and an extension to the specifically ministerial field (cf. c. 274 § 2). For religious, it is harmoniously inserted in the evangelical admonition of obedience professed by vow (cf. cc. 590 § 1, 601).

Although the description of the offense is open-ended, the nature of penal law calls for a strict interpretation that refers to the hypothesis of grave violations of communion in the system.[11] For less grave disobedience, it is sufficient to have recourse to administrative sanctions.

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9. Cf. Code Commission, *Codex Iuris Canonici. Schema Novissimum*, 1982, c. 1371,2°.
10. Thus, e.g. A. CALABRESE, *Diritto penale canonico*, cit., pp. 219ff.
11. In this sense, cf. T.J. GREEN, *Sanctions in the Church*, in J.A. CORIDEN-T.J. GREEN-D.E. HEINTSCHIEL, *The Code of Canon Law. A Text and Commentary* (New York 1985), p. 922; and R. SEBOTT, *Das kirchliche Strafrecht: Kommentar zu den Kanones 1311–1399 des Codex iuris canonici*, (Frankfurt/Main 1992), p. 176f.

c) *Some common characteristics*

In all these offenses, admonishment is a requirement for consummation of the offense. Therefore, the need for an admonishment is established regardless of the fact that a censure may be applied as penalty (cf. 1347 § 1). Naturally, the norm in c. 1330 on the need to be received for there to be a consummated offense is applied to the offenses of doctrinal disobedience in this canon.

2. *Penalty*

The *ferendae sententiae* penalty for these offenses was initially indicated as facultative but was transformed into preceptive after the suggestions of various constitutive bodies were accepted.[12] The fact that the penalties are indeterminate, together with the openness of the respective penal types, requires prudent evaluation of each case and all its circumstances (gravity and harm of the conduct, condition of the person doing it, damage and scandal caused, etc.) to determine the proportional penalties to be imposed. In the prior admonition, it seems right to specify the penalty that will be incurred if the behavior continues.

The special gravity of the offense relating to the definitive doctrines described in c. 750 § 2 must be taken into account when determining the just penalty, which should be greater than the penalty established for cases of infallible magisterium (cf. c. 752). Nevertheless, the offense is distinguished from heresy, which is punished with excommunication pursuant to c. 1354 § 1. Canon 1349 also should be considered in the application of indeterminate penalties.[13]

12. Cf. *Comm.* 9 (1977), p. 308.
13. On this new offense, cf. J. BERNAL, *La protección penal de las verdades propuestas por el Magisterio (m.p. "Ad tuendam fidem")*, in "Fidelium Iura" 9 (1999), pp. 77-135.

1372 Qui contra Romani Pontificis actum ad Concilium Oecumenicum vel ad Episcoporum collegium recurrit censura puniatur.

A person who appeals from an act of the Roman Pontiff to an Ecumenical Council or to the College of Bishops, is to be punished with a censure.

SOURCES: c. 2332

CROSS REFERENCES: cc. 331–333 § 3, 1331–1333, 1344, 1347, 1404

COMMENTARY

Ángel Marzoa

1. *Introduction*

"Those who affirm that it is licit to appeal from the judges of the Roman Pontiff to the ecumenical council, as a superior authority, turn from the strait path of truth" (Dz.-Sch., 3063). Thus, based on the testimony of Sacred Scripture and following the decisions of Roman Pontiffs and earlier councils, Vatican Council I renewed the definition of the Council of Florence (Dz.-Sch., 1307) and proclaimed this truth to be an article of Catholic faith that must be believed as divinely revealed (cf. c. 750 with regard to 1371,1°).

a) *Historical background*

In 1460, in the Bull *Exsecrabilis*, Pope Pius II (1458–1464) prohibited calling a council against the Roman Pontiff under penalty of excommunication. Before he was elevated to the Pontificate, Pius II had participated in conciliar ideas at a time when conciliarism was not yet considered openly and unequivocally contrary to the primacy of the Roman Pontiff; thus, it was accepted by faithful men of the Church. The conciliarist theory arose from the need to end the Great Schism of the West—embodied in Gregory XII, elected by the Roman cardinals, and Benedict XIII, elected by dissident cardinals.[1] The first controversy occurred at the "council" of Pisa in 1409. It was called under conciliar proposals, but instead of being a true synod of

1. Cf. AMANIEU, "Appel au Concile général," in *Dictionnaire de Droit Canonique*, I, cols. 807ff; J.L. JIMÉNEZ HERNÁNDEZ-PINZÓN, "Conciliarismo," in *Gran Enciclopedia Rialp* (Madrid 1979), pp. 182–184.

bishops, it was an assembly composed of groups interested in resolving the schism. However, not only was the problem of the schism not resolved, but a third pope—Alexander V—was elected. Thus, three men claimed the title of head of the Church.

Later, motivated by conciliarism, a General Congregation of the Nations was held in Constance (1414–1418). In 1415, the Roman Pope Gregory XII solemnly convoked this meeting *as a council*, which he had not initiated. At the council, he resigned his pontifical authority, and Benedict XIII and John XXIII were deprived of their titles (John XXIII was elected successor to Alexander V). Pope Martin V (1417) was elected, and the entire Church recognized him. Thus, the Council of Constance was born of a meeting that was the fruit of the conciliar theory. During the first part of the Council of Constance, before Gregory XII's convocation, the general councils' superiority to the pope was unequivocally declared. Therefore, along with its great success in mending the schism, the Council resulted in conciliarist theories taking deep root among theologians and political leaders.

Conciliarism surfaced with all its bravado at Basel (1431–1449). There, a heterogeneous group of abbots, clerics, and university men claimed that they were the representatives of the universal Church. They tried to subordinate the pope and continue the work of the worst spirit of Pisa and Constance. No longer was the supremacy of the council over doubtful popes defended. Instead, a "democratic" conception of the Church was claimed. It was argued that the pope's power is transmitted to him from all the baptized and is truly rooted in them. Therefore, the pope, in a certain sense, is only a delegate. Appealing to the council against acts of the pope follows logically. The radicalism of Basel ended with another election of an anti-pope. However, Eugene IV convoked the Council of Florence (1438–1445), where conciliarism was energetically condemned in the *Decree for the Greeks*. The conciliarist theory, however, survived in Gallicanism and Febronianism.

After Pius II's Bull *Exsecrabilis*, conciliarist errors were condemned by Julius II (1503–1513) and Gregory XIII (1572–1585). Later, Pius IX (1846–1878) condemned it in the Constituion *Apostolicae Sedis* (§ 1,4; § 6,1), the inspiration for the text of c. 2332 *CIC*/1917.

b) *The 1917* CIC

Canon 2332 *CIC*/1917 included what it had inherited from prior documents and included more types of offenses than c. 1372. With respect to the active subject of the offense, it covered both physical and moral persons (universities, religious chapters or colleges). Concerning the act designated as an offense, it specified appeals "to the universal Council of the laws, decrees, or mandates of the Roman Pontiff." With regard to penalties, excommunication was established *speciali modo* and reserved to the Holy See, regardless of the rank or condition of the physical person who

committed the offense ("though he be a king, bishop or cardinal"). With an equally strong reservation, interdict was prescribed for moral persons. The express mention of cardinals was obligatory because of the restriction in c. 2227 § 2 *CIC*/1917—there is no equivalent norm in *CIC*. On the other hand, the mention of kings and bishops was "for emphasis."[2]

c) *The new canon*

Since the current *CIC* has eliminated any consideration of moral persons as subjects of the offense as well as the restriction of c. 2227 *CIC*/1917 and the degrees of reservation, the norm in c. 1372 carries no substantial differences from prior tradition. There are only two differentiating nuances. The expression "act of the Roman Pontiff" has been chosen, and express mention is made of the College of Bishops, in addition to the ecumenical council. This addition can be explained insofar as a difference (with greater ecclesiological development since Vatican Council II) can be made between the College of Bishops as a subject of the supreme and full power over the Church, and the ecumenical council as a solemn form of exercising this power (cf. cc. 336–337). Therefore, there could be recourse to the College of Bishops that would not necessarily have an ecumenical council as its purpose. With respect to the expression "act of the Roman Pontiff" in relation to the express mention of "laws, decrees or mandates" in *CIC*/1917, the question is not very relevant; the new expression seems preferable, since what is important is that the recourse be against "an act of the Roman Pontiff," regardless of the form.[3]

Regarding the development of the text of the canon, it is worth observing that, in the 1973 *Schema*, this offense was not taken into consideration. However, after a petition by the consultors, it was decided to include it, with minimal editing.[4] Where the first wording was "ad Concilium Oecumenicum *vel aliter ad* Let.iscoporum Collegium," the final version said "ad Concilium Oecumenicum *vel ad* Let.iscoporum Collegium." This change was probably due to editorial criteria, but it confirms the reason given above regarding naming the council and the college separately. In this regard, Nigro observes that inclusion of this offense was the subject of discussion, in spite of the doctrine of collegiality that had concerned Vatican Council II.[5] Indeed, collegiality does not assume a concession to the conciliar theory in the sense of weakening affirmation of the primacy of the Roman Pontiff; he is personally the subject of supreme and full power (cc. 332–333); so is the College of Bishops, together with its head, the Roman Pontiff—but never without this head (c. 336). Therefore,

2. L. MIGUÉLEZ, commentary on c. 2332, in *Código de Derecho Canónico y Legislación complementaria* (Madrid 1969).

3. L. CHIAPPETTA, *Il Codice di Diritto Canonico* (Naples 1988), p. 505.

4. Cf. *Comm.* 9 (1977), p. 320.

5. Cf. F. NIGRO, in P.V. PINTO (Ed.), *Commento al Codice di Diritto Canonico* (Rome 1985), pp. 805–806.

recourse to the College of Bishops or an ecumenical council against an act of the Roman Pontiff implies denial of either the primacy of the Roman Pontiff (cf. cc. 333 § 3, 1404) or of his function as head of the College of Bishops. That is why canonical doctrine has considered recourse to a council as an act of declared contempt, schismatic in nature or at least with a *saporem schismatis*.

2. *Offenses*

The type of offense considered here may be broken down into the following elements:

a) Active subject: any member of the faithful in any condition in the Church.

b) Subject matter of the offense: recourse against an act of the Roman Pontiff to the College of Bishops or an ecumenical council. The following explanations should be helpful:

— What is meant is any recourse or appeal (cf. c. 333 § 3), but it must be formal,[6] that is, a genuine appeal or recourse *to the authority* of the college or council, taken to be *above* the Roman Pontiff.

— *Against an act of the Roman Pontiff*: whatever the nature of the act (legislative, judicial or administrative), whether directed universally or particularly[7]: "tutto ciò che egli ordina, programma, proibisce, ecc."[8] But, it must be a real and properly pontifical act,[9] not an act of the Roman Curia, which is an act of the dicastery itself, although its power comes from the root power of the pastor.[10] Under current law, no act of the Roman Curia can be identified as originating *from* the Roman Pontiff for the purposes of this offense,[11] except one with the specific approval of the

6. Cf. L. MIGUÉLEZ, commentary on c. 2332, cit.

7. Cf. A. VERMEERSCH-J. CREUSEN, *Epitome Iuris Canonici*, III, (Mechlin-Rome 1936), pp. 323–324; F.X. WERNZ-P. VIDAL, *Ius Canonicum*, VII (Rome 1937), p. 478.

8. A. CALABRESE, *Diritto Penale canonico* (Milan 1990), p. 221.

9. Given the nature and basis of the issue, we think that the distinction drawn by CHIAPPETTA is appropriate: namely, that the recourse-object of the delict is contrary to any act of the Roman Pontiff, whatever its form, granted that it proceeds from him in his capacity as supreme head of the Church, not as the head of the State of Vatican City: *Il Codice di Diritto Canonico*, cit., p. 505.

10. E. LABANDEIRA, *Tratado de Derecho Administrativo canónico*, 2nd updated ed. (Pamplona 1992), p. 162.

11. For opinions to the contrary, including the suppositions of the special mandate, e.g.: F. AZNAR, commentary on c. 1372, in *Salamanca Com*; L. CHIAPPETTA, *Il Codice di Diritto Canonico*, cit., p. 505; A. CALABRESE, *Diritto Penale canonico*, cit., p. 221. Cf., for this question, A. VIANA, "La potestad de los Dicasterios de la Curia Romana," in *Ius Canonicum* 30 (1990), pp. 99–103, 109–114; E. LABANDEIRA, *Tratado de Derecho administrativo*, cit., pp. 162–164, note especially 40; V. GÓMEZ IGLESIAS, "La 'aprobación específica' en la 'Pastor Bonus' y la seguridad jurídica," in *Fidelium Iura* 3 (1993), pp. 361–423.

Supreme Pontiff, because of the express prohibition of *Regolamento generale della Curia Romana* 134 § 4 (cf. *PB* 18 b).

c) In case of recourse to an ecumenical council, that council may be a present or future one. The Constitution *Apostolicae Sedis*, which was the immediate precedent for c. 2332 *CIC*/1917, expressly used the term *futurum Concilium*. Neither *CIC*/1917 nor *CIC* expresses this distinction because it is self-evident.

3. *Penalties*

A semi-determinate, preceptive (*puniatur*) *ferendae sententiae* penalty is established. The semi-determination is important because of the restriction imposed by c. 1349 in the case of indeterminate penalties. Here, the legislator himself deemed that "the gravity of the case requires it" and preceptively specified (cf., however, c. 1344) a censure.

In the case of clerics, the penalty may be excommunication, interdict, or suspension. In the case of other members of the faithful, it may be only excommunication or interdict (cf. cc. 1331–1333).

In any case, there must be at least one warning given before imposition of the censure for it to be valid (cf. cc. 1347).

1373 **Qui publice aut subditorum simultates vel odia adversus Sedem Apostolicam vel Ordinarium excitat propter aliquem potestatis vel ministerii ecclesiastici actum, aut subditos ad inoboedientiam in eos provocat, interdicto vel aliis iustis poenis puniatur.**

A person who publicly incites his or her subjects to hatred or animosity against the Apostolic See or the Ordinary because of some act of ecclesiastical authority or ministry, or who provokes the subjects to disobedience against them, is to be punished by interdict or other just penalties.

SOURCES: cc. 2331 § 2, 2344; SCCouncil Decr. *Catholica Ecclesia*, 29 iun. 1950 (*AAS* 42 [1950] 601–602)

CROSS REFERENCES: cc. 361, 134 § 1, 1332, 1344, 1347, 1349, 1369

COMMENTARY

Ángel Marzoa

1. *Precedents*

The precedents for this canon are in cc. 2337 and 2344 of *CIC*/1917. In c. 1373, the designation of the act in which this offense consists is more open. Nevertheless, perhaps keeping the two precedents in mind will help give specific, although non-exclusive, examples of when the circumstances of these offenses could occur. Canon 2337 designated as an offense the attitude of a parish priest who tried to prevent ecclesiastical jurisdiction from being exercised by, for example, provocation, publicly collecting signatures, or inciting through the written or spoken word (§ 1), as well as inciting people to prevent a legitimately named priest from entering the parish (§ 2). Canon 2344 designated as an offense the attitude of anyone who promoted animosity or hate against the acts, decrees, or decisions of the hierarchy, as well as other cases.

The current canon has scant prior history. It is of interest to note that initially some of the Fathers consulted were against introducing the canon since they believed that the material was found already in the preceding canon (current c. 1371). However, the Commission of Consultors defended its separate treatment: "quia aliquis simultates vel odia excitare potest, quin neget vel impugnet doctrinam in actis ministerii ecclesiastici contentam." It was suggested that the penalty not be facultative, as it was

in the 1973 *Schema*. The proposal was accepted and a preceptive penalty was established.[1]

2. *Offenses*

There are two types of offenses established in this canon, which have the following elements in common:

— The active subject of the offense may be *any member of the faithful*, even though not in a hierarchical subordinate position with the ordinary against whose acts the delictive act is directed, but always with respect to the Apostolic See.

— The acts *have as their cause or object an ecclesiastical act of authority or ministry* of the hierarchy ("propter... actum," "in eos"). This is not merely a direct act of incitement to generic hate or contempt, a case dealt with in c. 1369, when it is committed through means of social communication. The expression "act of ecclesiastical authority or ministry" is broad enough to include any act binding on the subjects. The only caveat is that those acts must be ecclesial-canonical in nature. Therefore, an act of the hierarchy on strictly temporal matters, which would not be binding on the faithful, does not qualify.

— The act of inciting to hate/animosity or disobedience *must be directed at the subjects* of the superior from whom the act of authority or ministry emanated: the Apostolic See (cf. 361) or ordinary (cf. 134 § 1). Not included in these types of offenses are acts not directed immediately to the specific subjects (faithful of the diocese, members of the institute, etc., under the direct jurisdiction of the ordinary and therefore the persons for whom his acts of authority or ministry are intended). It is possible that these acts could incur in the offense of c. 1369. The restriction arises from the use of the term "ordinary." While the term "Apostolic See" includes all faithful, the term "ordinary" includes only the addressees of the act of authority or ministry.

— Finally, *consummation of these offenses does not depend upon the result* being pursued. The legislator designates the attempt to incite to hate/animosity or disobedience as the offense proper, regardless of whether the objective is achieved.

With these elements in common, the two types of offenses designated in the canon are: a) publicly inciting animosity or hate against the Apostolic See or the ordinary because of an ecclesiastical act of authority or ministry; and b) inciting subjects to disobey an ecclesiastical act of

1. Cf. *Comm.* 9 (1977), p. 308.

authority or ministry of the Apostolic See or the ordinary. Incitement does not need to be public.[2]

While for the first type the legal text expressly requires that the act be public, for the second type this specification is not made. What is always required for the concept of offense is external nature (see commentary on c. 1321), not public nature ("public" as opposed to "private," not to "internal" or "inner"). Another question is that of proof, but it affects punishability, not whether there is an offense to begin with.

3. *Penalties*

A semi-determinate, preceptive (*puniatur*) *ferendae sententiae* penalty is provided. It is semi-determinate because of the suggestion that the penalty be interdict or other just penalties. In the light of the restriction in c. 1349 on censures, the criterion that appears to have been introduced is that if a censure is to be imposed because "the seriousness of the case really demands it," then it must be the penalty of interdict (cf. c. 1332). If the case does not demand it, then a sufficient expiatory penalty must be imposed. When the penalty chosen is interdict, because it is a censure, then the requirement of prior admonishment must be observed *ad validitatem* (cf. c. 1347).

With regard to the preceptive nature of the penalty, the provisions of c. 1344 must be kept in mind.

2. Cf. in the same sense F. AZNAR, commentary on c. 1373, in *Salamanca Com*; F. NIGRO, *Commento al Codice di Diritto Canonico* (Rome 1985), p. 806. On the contrary, A. CALABRESE, *Diritto Penale canonico* (Milan 1990), p. 222.

1374 Qui nomen dat consociationi, quae contra Ecclesiam machinatur, iusta poena puniatur; qui autem eiusmodi consociationem promovet vel moderatur, interdicto puniatur.

A person who joins an association that plots against thesm Church is to be punished with a just penalty; one who promotes or takes office in such an association is to be punished with an interdict.

SOURCES: c. 2335; SCDF Litt., 18 iul. 1974; SCDF Decl., 26 feb. 1975; SCDF Decl., 17 feb. 1981 (*AAS* 73 [1981] 240–241)

CROSS REFERENCES: cc. 1332, 1344, 1347, 1349–1350

COMMENTARY

Ángel Marzoa

1. *Introduction*

Canon 1374 generically deals with associations that plot against the Church. This leads to a comparison with cc. 2335 and 1336 *CIC*/1917, where masonry is explicitly mentioned, then "other associations which plot against the Church."

The express omission of masonry from *CIC* could be interpreted as a change of policy by the Church, but that would be an incorrect analysis. The point is confirmed by the 1983 *Declaration* of the SCDF; however, a knowledge of the *iter* taken in drawing up the canon leads to the same conclusion:

a) In the 1973 *Schema*, not even the generic case of plotting was taken from 2335 *CIC*/1917.

b) Perhaps due to this omission, many bishops addressed the SCDF and requested an evaluation and interpretation of c. 2335 (*CIC*/1917). On July 19, 1974, the SCDF replied in a *Letter* at some of the bishops' conferences. As the *Letter* indicates, at the request of the many petitions listed, the Holy See had lengthy consultations at the bishops' conferences that were particularly interested in or affected by the matter of the nature of the associations and their present activities in an effort to learn better the bishops' thoughts on the matter. However, with the disparity of responses due to the diversity of locations, the Holy See decided not to modify the effective date of the general legislation until the revised *CIC* was published. However, it noted that it must be kept in mind that penal laws are

to be interpreted strictly. Therefore, it was possible to teach and apply the opinion of those who maintained that c. 2335 *CIC*/1917 referred only to Catholics who registered in associations that really (*revera*) plot against the Church. In any case, the prohibition against clerics, religious, and members of secular institutes joining any masonic association remains.[1]

When consulted about the 1973 *Schema*, the SCDF proposed: "Valde oportunum videtur ut, praeter delicta hoc in articulo contenta [referring to cc. 52–54 of the 1973 *Schema*]... sequentia addantur: 'qui nomen dant associationibus quae contra Ecclesiam machinantur (cf. can. 2335)': in formulatione generica huius delicti non includeretur expresse secta massonica, sed neque excluderetur. Canon eidem applicaretur si et quatenus ipsa vel aliquis ex ipsius ramis vel ritibus reapse machinarentur contra bonum Ecclesiae; aliae specificationes statui possunt in iure particulari, iuxta diversa adiuncta locorum et associationum."[2]

c) In accordance with the SCDF's proposal,[3] at the working session of May 7, 1977, the penal law *coetus* introduced a canon that would include the subject matter in question: "Qui nomen dat consociationi quae contra Ecclesiam machinatur, iusta poena puniatur; qui autem eiusmodi consotiationem promovet vel moderatur interdicto puniatur."[4] In contrast to c. 2335 *CIC*/1917, explicit mention of masonry is omitted, as are cases of plotting against "legitimate civil authorities." A preceptive *ferendae sententiae* penalty was provided, the censure of interdict.

d) *However, on February 17, 1981, the SCDF published a Declaratio*, which stated that Catholics are prohibited from joining masonic associations, under pain of excommunication. It announced the *Letter* of July 19, 1974 and was based on the fact that masons "locum dedit falsis et captiosis interpretationibus." In response, it stated with regard to the subject in question, "nullo modo mutata est disciplina canonica." Therefore, "neque excommunicatio neque ceterae praevisae poenae disciplina abrogatae sunt."

— What was said in the 1974 *Letter* on interpretation of the canon must be understood, as was the proposal of the Congregation, "solummodo tamquam appellatio ad principia generalia de interpretatione legum poenalium pro solutione casuum singularum personarum," who might be subject to judgment by the local ordinary. The Congregation did not intend

1. The text of the *Letter*—cited as among the sources of the canon and dated July 18, 1974—can be consulted in *AAS* 73 (1981), p. 240, note 1, where the SCDF prints it in the *Declaration* of February 17, 1981. The *fontes* of the canon refer to another *Declaration* of the SCDF dated February 26, 1975.

2. *Osservazione della S.CD.F.*, p. 17. Taken from PCILT, *Acta et Documenta Pontificiae Commisionis Codici Iuris Canonici Recognoscendo: Congregatio Plenaria (Diebus 20–29 octobris 1981 habita)* (Typis Polyglottis Vaticanis 1991), p. 152; which makes mention of the new *Schema* on p. 168.

3. "Proponente Sacra Congregatione pro Doctrina Fidei": ibid., p. 152.

4. *Comm.* 9 (1977), p. 320.

to give bishops' conferences the faculty to issue a general judgment on the nature of masonic associations that might involve a derogation of the canonical norm.[5]

e) The 1980 *Schema* includes the matter in c. 1326, without explicit mention of "Masonic sects." This led to petitions from the consultors[6] to return to the terms in c. 2335 *CIC*/1917, explicitly naming masonry. The consultors also preferred a *latae sententiae* censure.

At this point, it was deemed opportune to take the matter to the plenary, with a unanimous vote of the *coetus* that the penalty not be *latae sententiae*: *a)* because of the incompatibility of masonry with the Catholic faith—an argument used in the *animadversiones*—which either assumes the offense of heresy, in which case it falls under c. 1315 (currently 1364), or does not, in which case it does not merit such a grave penalty; and *b)* as for "plotting" against the Church, masonic sects are not the same in all places. Therefore, it seemed better that penal norms more in accord with the specific circumstances be established in particular laws, where necessary.

f) At the plenary (*V^{a} Congregatio*, October 1981) the question was addressed in the following terms: "Utrum reassumi debeat can. 2335 vigentis *CIC* in quo nomen dantes sectae massonicae aliisvis eiusdem generis associationibus quae 'contra Ecclesiam vel legitimas civiles potestates machinantur' puniuntur excommunicatione latae sententiae an sufficiat can. 1326 Schematis?"[7]

In the documentation attached to the consultation, the *animadversio* brought by the German Conference of Bishops had specific weight, with an extensive exposition resulting from a "long and deep examination made in 1974–1980 in the form of an official encounter between the Catholic Church and masonry."[8] The German bishops had reached the conclusion that it was not compatible to belong to masonry and the Church. Therefore, they proposed to retain the content of c. 2335 *CIC*/1917 in the new legislation.

Also attached as a working document was a *votum* from the canonist E. Gómez, op., who advocated in favor of the thesis of the *coetus* that the penalty should not be *latae sententiae*, much less excommunication. He proposed remission of the question to the bishops' conferences in nations where circumstances made more specific and grave measures advisable.[9]

5. Cf. *AAS* 73 (1981), pp. 240–241.
6. Cf. *Comm.* 16 (1984), pp. 48–49.
7. Cf. PCILT, *Acta et Documenta...*, cit., pp. 150–168, 308–312.
8. Cf. PCILT, *Acta et Documenta...*, cit., p. 152. For the text of the *animadversio*: pp. 152–164.
9. Cf. ibid., pp. 165–167.

At the plenary study sessions,[10] not all the Fathers accepted the reasoning of the *coetus*, such as the need to reduce *latae sententiae* penalties to a minimum, to leave the penalty of excommunication for a very few and very grave offenses, and deficiencies of juridical certainty sufficient for the penalty, since it is automatic, to be effective. However, the theological and pastoral arguments were profound. They especially valued the psychological repercussion that elimination from the new Code of any explicit mention of masonry could have on public opinion. There were a number of proposals to preserve the penalty of *latae sententiae* excommunication and to mention masonry explicitly. Other Fathers, however, supported the thesis of the *coetus*. When the question was submitted to a vote, although there were a number of votes in favor of returning to c. 2335, a majority was favorable to the text of c. 1326 in the *Schema*.[11] In addition, the proposal to assign different penalties to "joining an association ..." and "promoting or taking office" was accepted.

g)In the same month and year that the new Code took effect, a new *Declaration* of the SCDF (November 26, 1983) answered the doubts of interpretation raised by omitting an explicit mention of masonic associations in the canon. The *Declaration* stated that the omission was due solely to editorial policy and did not alter the negative judgment on those associations, because their principles are incompatible with Church doctrine. The same principle is applicable to other associations that are not explicitly mentioned. Thus, nothing of substance was added to the meaning of the 1981 *Declaration*.[12]

It is evident that the interpretation of the canon is unequivocal. What is being dealt with is the designation of an offense that includes *any association* that plots against the Church. Belonging to an association that has among its objectives to harm the Church in any way is obviously contrary to being a member of the Church.

2. *Offenses*

There are two offenses established in the canon: a) *joining* an association that plots against the Church (*nomen dare* is understood as to register, join, become a member, participate, etc.[13]); and b) t*aking office in* or *promoting* such an association.

Obviously, the second offense is graver in a material sense, since it assumes taking on the tasks of promoting and directing anti-Church activities. It is also graver because the function of directing or promoting

10. Cf. ibid., pp. 308–330.
11. For technical reasons, the voting is carried out twice, on two separate days: cf. ibid., pp. 330, 352.
12. Cf. *AAS* 76 (1984), p. 300.
13. Cf. A. CALABRESE, *Diritto penale canonico* (Milan 1990), p. 223.

implies greater involvement and, therefore, greater subjective responsibility. Thus, it is consistent that the penalty provided is greater.

Regarding "plotting against the Church," as Calabrese points out, it is not required that all the association's activities are directed against the Church. It is sufficient that conspiracy is a part of the institution or *de facto* of its purposes and activity,[14] even if that is not its sole *raison d'être*. As the SCDF stated, "si et quatenus ipsa vel aliquis ex ipsius ramis vel ritibus reapse machinarentur contra bonum Ecclesiae."[15]

It can be argued that, in comparison with *CIC*/1917 (c. 2335), not explicitly mentioning any associations or making the penalty automatic leaves the norm so general that it is difficult to apply. It is true that the norm in c. 1374 absolutely involves the authority, since it is the authority that must evaluate each case to determine to what degree any particular association meets the description of the designated offense. But, as the penal law *coetus* suggested in response to the first *animadversiones* to the offense, facile recourse to automatic penalties never resolves difficulties; on the contrary, it indicates a certain inability on the part of whoever has the function of governance to fulfill his job adequately.[16]

Nevertheless, in spite of the absence of an explicit mention of masonic associations in the canon, the 1983 SCDF *Declaration* must be kept in mind. It clarifies that the Church's judgment on the matter has not changed. Members of the faithful who belong to masonic associations are in a state of grave sin and cannot come to the Eucharist. Lesser ecclesiastical authorities cannot derogate from this norm. This is sufficient reason to believe that subsumption of masonic associations should be assumed, even though, in the case of other associations, an explicit statement should be made by the hierarchy in order to determine if they fall into this type of offense. Only a specific judgment to the contrary would justify an explicit pronouncement of non-subsumption, which would have to be well founded.

3. *Penalties*

There are different penalties for each of the designated offenses:

a) For the offense of joining, the canon provides a preceptive (*puniatur*), *ferendae sententiae*, but indeterminate (*iusta poena*) penalty. To determine the penalty, the judge or superior must take into account the criteria established in the general norms on the matter, especially cc. 1344,

14. Cf. ibid., pp. 223–224.
15. *Letter* of the SCDF from 1974: cf. note 1.
16. Cf. *Comm.* 16 (1984), p. 49.

1347, 1349, 1350. With respect to the preceptive nature of the penalty, the provisions of c. 1344 must be kept in mind.

b) For the offense of promoting or taking office, there is a determinate preceptive (*puniatur*) *ferendae sententiae* penalty, interdict (cf. c. 1322). Because this penalty is a censure, the requirement of prior admonishment (cf. c. 1347) must be observed *ad validitatem*. With respect to the preceptive nature of the penalty, the provisions of c. 1344 must be kept in mind.

1375 Qui impediunt libertatem ministerii vel electionis vel potestatis ecclesiasticae aut legitimum bonorum sacrorum aliorumve ecclesiasticorum bonorum usum, aut perterrent electorem vel electum vel eum qui potestatem vel ministerium ecclesiasticum exercuit, iusta poena puniri possunt.

Those who hinder the freedom of the ministry or of an election or of the exercise of ecclesiastical power, or the lawful use of sacred or other ecclesiastical goods, or who intimidate either an elector or one who is elected or one who exercises ecclesiastical power or ministry, may be punished with a just penalty.

SOURCES: cc. 2334, 2337, 2345, 2346, 2390; CodCom Resp. V, 25 iul. 1926 (*AAS* 18 [1926] 394); SCCouncil Decr. *Catholica Ecclesia,* 29 iun. 1950 (*AAS* 42 [1950] 601–602)

CROSS REFERENCES: cc. 164ff, 1343–1344, 1347, 1349–1350

COMMENTARY

Ángel Marzoa

1. *Introduction*

Offenses from various canons of *CIC*/1917 are grouped together in this canon. As indicated in the sources of the canon, to find the elements of the matter constituting the offense, we must look at cc. 2334, 2337, 2345, 2346, and 2390 *CIC*/1917. Under the general framework of the heading under which this norm is placed, the general concept is *hindering the exercise of ecclesiastical functions.* The sanction provided for all the offenses is indeterminate and facultative, in contrast to the gravity and automatic application of most of the penalties in the *CIC*/1917 canons cited.

Now that the field of designated offenses is so open, many different degrees of material gravity are also possible. That is why, after opting for such a broad type of offense, the legislator leaves it to the prudence of the authority with jurisdiction to decide about the punishment and determine the penalty.

2. *Offenses*

The types of offenses included in this canon are very generic; however, they deal with two types of behavior: hindering and intimidation.

Hindering is performing any action to prevent the free exercise of any activity. Arias notes: "The action must be effective; therefore it is a material offense that needs an actual result. One may find here situations of attempted or frustrated offenses"[1] (see commentary on c. 1328). In addition, Canon 1373 must be taken into consideration since it treats cases of inciting persons to disobedience against acts of ecclesiastical authority or ministry.

The cases specifically designated as offenses include:

— hindering the free exercise of ecclesiastical ministry, especially administration of the sacraments and preaching;

— hindering a canonical election (election must be understood to mean the system of filling an ecclesiastical office; cf. cc. 164ff). It includes freedom of electors to be able to perform the act of election, freedom of the elected to accept the duty for which elected, and freedom of the person who must, if required, confirm the election;

— hindering the free exercise of ecclesiastical power (cf., e.g., cc. 129ff, 331, 336, 381, 391);

— hindering the lawful use of sacred goods (cf. cc. 1171 and 1269) or other ecclesiastical goods (cf. c. 1257 § 1). The hindering action must be unjust; therefore, it would not be an offense to hinder or prevent the unlawful use of the goods.

Intimidation is broader than that of hindrance, since it includes failed attempts (e.g., a threat that did not succeed in its purpose), and cases of reprisal for having performed the act that was to be prevented. Therefore, the following acts are offenses:

— unsuccessful intimidation by those who have participated in a canonical election, of a person elected who has accepted election, and over a person who may have confirmed the election. It includes all reprisals against electors for having proceeded to elect or for having elected a certain person, against anyone elected for having accepted the election, or against anyone who might have confirmed it;

— intimidating someone who has exercised ecclesiastical authority or ministry. Included are reprisals for having acted in spite of attempts or threats to prevent it.

1. J. ARIAS, commentary on c. 1375, in *Pamplona Com.*

3. *Penalties*

For all these offenses, an indeterminate (*iusta poena*), facultative (*puniri possunt*), *ferendae sententiae* penalty is provided. To determine the appropriate penalty, the judge or superior must keep in mind the criteria established in the general norms on the matter, especially cc. 1344, 1347, 1349, 1350. With respect to the facultative nature of the penalty, the judge or superior must consider the provisions of c. 1343.

1376 Qui rem sacram, mobilem vel immobilem, profanat iusta poena puniatur.

A person who profanes a sacred object, moveable or immovable, is to be punished with a just penalty.

SOURCES: cc. 2325, 2328, 2329

CROSS-REFERENCES: cc. 1169, 1171, 1211, 1344, 1347, 1349–1350

COMMENTARY

Ángel Marzoa

1. *Introduction*

Although the term *sacred objects* appears to refer to c. 1171, and in that sense, it would not be applicable to cc. 1205ff ("sacred places"), such a restrictive use was not intended by the legislator. That would lead to the inconsistency of designating as an offense the profanation of objects such as a paten or a chalice, but not a church, cemetery or altar. In addition, the distinction made in the canon between movable and immovable goods obviously extends the concept to places. Therefore, in this canon, *sacred objects* must be understood to mean anything designated for worship by consecration, dedication, or blessing as prescribed in the liturgical books (cf. cc. 1169, 1171, 1205).

The term *dedication* is equivalent to *consecration*, but it is more properly used to refer to places, while *consecration* is reserved for the Eucharist, persons and certain objects. With respect to the term *blessing*, it must be understood as a *constitutive* blessing (cf. c. 1148 § 2 *CIC*/1917); it produces the same effect as consecrations or dedications, giving the quality of sacredness (permanently designated for divine worship) to the objects upon which it is imparted.[1] Therefore, it is different from other blessings, for which thanks and principally spiritual effects are invoked for the persons who use them, such as in the blessing of food, fields, and means of transportation.

This norm was not in the first *Schema*. It was included because of requests by certain consultors of the SCDF in 1977 in the same terms as are found in the canon today.[2]

1. Cf. J.T. MARTÍN DE AGAR, commentary on c. 1171 and 1169, in *Pamplona Com.*
2. Cf. *Comm.* 9 (1977), p. 309.

2. *Offense*

Sacred objects are designated for divine worship; therefore, they cannot be used for profane or secular purposes. If c. 1375 teaches the lawful use of these goods, c. 1376 tries to avoid their designation for profane uses. This applies equally to sacred things that are both *movable* (tabernacle, chalice, paten, ciborium, images) and *immovable* (church, altar, cemetery).

In addition to the reverence due to sacred objects, c. 1171 establishes that "they are not to be made over to secular or inappropriate use." Canon 1210 establishes that "in a sacred place only those things are to be permitted which serve to exercise or promote worship, piety and religion. Anything out of harmony with the holiness of the place is forbidden." Clearly, from these two references, it cannot be deduced that anything not in accord with them would be an offense under c. 1376. Although, strictly speaking, any use other than what the object or place was designed for or dedicated to would be a "profane" or "secular" use, one cannot conclude that such other uses would always be profanation. Canon 1210 establishes that "the Ordinary may, however, for individual cases, permit other uses, provided they are not contrary to the sacred character of the place."

When, then, do we have cases of the offense of profanation? One clear case is that of "violation of a sacred place," described in c. 1211. However, considering that the penalty provided is facultative and *ferendae sententiae*, in each case it would be the ecclesiastical authority of jurisdiction that would evaluate whether the improper use of a sacred object or place constitutes profanation. In any case, it must be kept in mind that only external violation of a law or precept is an offense, and it must be gravely imputable (cf. c. 1321). Without prejudice to the duty incumbent upon ecclesiastical authorities to be vigilant over the dignity and propriety with which sacred objects and places are to be treated and used, imputing and sanctioning the offenses of profanation must be undertaken with the greatest prudence and after serious consideration, although with the fortitude that such matters require.

3. *Penalties*

A preceptive (*puniatur*), but indeterminate (*iusta poena*) *ferendae sententiae* penalty is provided. The preceptive nature of the penalty should be assessed in connection with the generic duties established in cc. 1171 and 1210. The indeterminate nature of the penalty is suited to the different degrees of gravity that this type of offense may involve.

To determine the penalty, the judge or superior must keep in mind the criteria established in the general norms in this respect, especially cc. 1344, 1347, 1349, 1350.

1377 Qui sine praescripta licentia bona ecclesiastica alienat, iusta poena puniatur.

A person who, without the prescribed permission, alienates ecclesiastical goods is to be punished with a just penalty.

SOURCES: c. 2347

CROSS REFERENCES: cc. 638 § 3, 1291, 1321 § 2, 1389 § 1

COMMENTARY

José T. Martín de Agar

1. In certain cases, alienation of ecclesiastical goods requires prior permission from the proper authority (cf. 1291, 1292, 638). Alienation carried out without the required permission is invalid under cc. 1291 and 638. It incurs the financial responsibilities for the act (cf. cc. 639, 1281 § 3, 1296) and may constitute an offense under c. 1377.

For an act of alienation of a certain relevance that seeks to preserve the stability of the patrimony of the public juridical persons who compose it, permission assumes that there is an act performed by the authority. The fact that a penal norm punishes the failure to observe this precaution is explained by the fact that the canonical invalidity of alienation is not always recognized in civil law, thus making the harm greater.

The act in this offense is the alienation of ecclesiastical goods without the required permission, which makes the act invalid. Therefore, the following are required for the offense:

a) There must be *alienation,* that is, an act by which permanently or, at least for a long time, the free use and enjoyment of the goods is lost.[1] It is not always easy to determine whether there has been alienation, but some transactions clearly fall outside the penal category, such as those that are not offenses but are subject to the same precautions as alienation under c. 1295, although they may be invalid due to failure to obtain permission.

b) The act of *alienation must require permission* under the law (cc. 1291, 638 § 3). The offense is not incurred through failure to comply with other legal or statutory requirements,[2] such as those established in

1. Regarding those affairs that bring about alienation, see commentary on c. 1295.
2. Cf. A. CALABRESE, *Diritto penale canonico* (Milan 1990), p. 231.

cc. 638 § 4 and 1293, unless the person giving permission places any of those conditions upon it. Then, if they are not fulfilled, there was no permission granted. On the other hand, the typical form of the offense exists when the permission required by law is not obtained, even if other conditions are met (cf. cc. 1292 § 2, 638 § 3).

c) The alienated goods must be *ecclesiastical*; they must belong to a public juridical person (for the concept of "ecclesiastical goods," see commentary on c. 1257).[3] The penal law in c. 1377 does not protect the goods of private persons, even when they are designated for ecclesial purposes, and their alienation could be invalid for lack of the permission required in certain cases by statutory law.

For there to be an offense, beside the fact that the acts must fall under the legal type in question, the general requirement for punishability must also be met (cc. 1321ff).

An offense is consummated when the act of alienation is perfected in its typical juridical elements, even though the act is null and void for failure to meet the legal requirement of permission, which is prior and external to the transaction. Under c. 1321 § 2, acts that constitute an offense must be performed with malice; simple negligence will not constitute this offense,[4] but it could be sanctioned under c. 1389 § 2.

2. Canon 1377 prescribes that the offense is to be punished, but it does not state the specific penalty to be imposed. Considering that this is a specific abuse of a public function, the penalty could be deprivation of office, under c. 1389 § 1. In any case, to determine the penalty, the consequences of the offense, foreseen or foreseeable by the offender, must be taken into consideration. In addition, the offense can be cumulative with other civil or ecclesiastical offenses, depending upon the circumstances in which it is committed.

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3. Calabrese, dealing with this offense, includes sacred goods among ecclesiastical goods, which does not seem exact (ibid., p. 229).

4. F. AZNAR, discussing this canon, considers that the form of the offense includes "the deceitful or culpable omission of the corresponding license": commentary on c. 1377, in *Salamanca Com.*

TITULUS III
De munerum ecclesiasticorum usurpatione deque delictis in iis exercendis

TITLE III
Usurpation of Ecclesiastical Offices and Offences Committed in Their Exercise

1378 **§ 1. Sacerdos qui contra praescriptum can. 977 agit, in excommunicationem latae sententiae Sedi Apostolicae reservatam incurrit.**

§ 2. In poenam latae sententiae interdicti vel, si sit clericus, suspensionis incurrit:

1° qui ad ordinem sacerdotalem non promotus liturgicam eucharistici Sacrificii actionem attentat;

2° qui, praeter casum de quo in § 1, cum sacramentalem absolutionem dare valide nequeat, eam impertire attentat, vel sacramentalem confessionem audit.

§ 3. In casibus de quibus in § 2, pro delicti gravitate, aliae poenae, non exclusa excommunicatione, addi possunt.

§ 1. A priest who acts against the prescription of Can. 977 incurs a *latae sententiae* excommunication reserved to the Apostolic See.

§ 2. The following incur a *latae sententiae* interdict or, if a cleric, a *latae sententiae* suspension:

1° a person who, not being an ordained priest, attempts to celebrate Mass;

2° a person who, apart from the case mentioned in § 1, though unable to give valid sacramental absolution, attempts to do so, or hears a sacramental confession;

3° In the cases mentioned in § 2, other penalties, not excluding excommunication, can be added according to the gravity of the offence.

SOURCES: § 1: c. 2367 § 1; SCHO Decr. *Cum ex expresso*, 21 iul. 1934 (*AAS* 26 [1934] 550); SCHO Decr. *In plenario*, 16 nov. 1934 (*AAS* 26 [1934] 634)
§ 2: cc. 2322,1°, 2366
§ 3: c. 2322,1°

CROSS REFERENCES:

COMMENTARY

Velasio De Paolis, cs.

Canon 1378 deals with a series of offenses: 1) absolving an accomplice in grave sin against the sixth commandment; 2) attempting to celebrate Holy Mass; and 3) attempting to administer sacramental absolution. In all of these offenses, the legislator wishes to protect the proper celebration of the sacraments of penance and the Eucharist. This is also the case in the description of other offenses, for example, in c. 1367 in reference to profanation of the Eucharistic species, in c. 1387 with respect to soliciting evil in connection with the sacrament of penance, and in c. 1388 concerning the sacramental seal, but different aspects are considered in the various types of offenses.[1]

1. *Offense of the absolution of an accomplice* (§ 1)

Although with a goodly degree of mitigation, c. 977 confirms the old norm on the subject (cf. c. 884 *CIC*/1917), depriving a priest of the faculty of confessing an accomplice from a sin against the sixth commandment. Therefore, any absolution given is invalid. Guided by c. 2367 of *CIC*/1917, the legislator sanctions with a canonical penalty (c. 1378 § 1) anyone who, in violation of c. 977, absolves an accomplice from a sin against the sixth commandment.

The sin of complicity is not to be confused with the offense of absolving an accomplice. The sin of complicity occurs when two or more persons, whether or not of the same sex, each conscious of the gravity of the sin, consents to an external sin—also grave in the external dimension—that is in itself libidinous.

1. Cf. V. De Paolis, "Il sacramento della penitenza," in *I Sacramenti della Chiesa* (Bologna 1989), pp. 278–286; idem, "De delictis contra sanctitatem sacramenti Paenitentiae," in *Periodica* 79 (1990), pp. 177–218.

The offense of absolving an accomplice occurs when a priest, against canonical prescriptions, absolves the accomplice of the sin. For the offense of absolving an accomplice in a grave sin against the sixth commandment, the time of committing the sin itself is irrelevant. This means that the priest is deprived of the faculty of absolving his accomplice even if he was not a priest at the time of the sin, even though decades may have passed and neither one had the least thought of becoming a priest. What matters is that the sin that the penitent confesses must be a sin of complicity with the person hearing his confession, even if the person hearing it was not a priest at the time the sin was committed. However, the prohibition against absolving an accomplice applies only to sins that have not yet been subjected to the power of the keys. Therefore, if the sin of complicity has already been absolved, it is not included in the prohibition. In addition, a confessor does not lose his faculty over the penitent who committed a sin of complicity with him; he loses it only over the sin of complicity. Furthermore, his disqualification is not perpetual; it lasts only until the sin has been lawfully absolved.[2]

Having said that, it is now time to make some fine points in relation to preceding law, the sin of complicity, and the offense of absolving an accomplice. To do so, we must turn to c. 977, which prohibits a priest from absolving the accomplice himself and deprives the priest of the faculty to give absolution We must also look at c. 1378 § 1, which protects the norm with a penal sanction.

a) *Comparison with the prior legislation*

With respect to the prior legislation, c. 884 *CIC*/1917, source of the new c. 977, presented two cases: normal instances or with danger of death. In the second case, there was a distinction between necessity and other situations. In general, a priest was prohibited from absolving his accomplice under pain of nullity of the absolution, and nullity occurred when there was no jurisdiction, according to the terms used in the old Code. The prohibition was also valid for cases of danger of death of the accomplice, provided that there was no need to exercise sacerdotal ministry because it was possible to find another priest; but even in that case any absolution given was merely illicit. The meaning of case of necessity can be better understood in reference to c. 2367 § 1 *CIC*/1917, which states that a priest who absolves or tries to absolve an accomplice in danger of death also incurs the penalty provided *si alius sacerdos, licet non approbatus ad confessiones, sine gravi aliqua exoritura infamia et scandalo, possit excipere morientis confessiones, excepto casu quo moribundus recuset alii confiteri.*

The reason for the distinction is easy to understand. In the final analysis, c. 884 made reference to the apostolic constitutions and *nominatim* to the Apostolic Constitution *Sacramentum Poenitentiae* of Benedict XIV

2. Cf. *Comm.* 15 (1983), p. 210.

(June 1, 1741), which was contained in an appendix as a normative text and considered a constituent part of the Code.

In c. 977, without distinguishing between need and no need, the current Code simply states that absolution given to an accomplice is invalid except in danger of death. In addition, there is no longer any reference to the Constitution of Benedict XIV, which is not appended to the Code and therefore no longer has any normative value.

With regard to c. 1378 § 1, its source is in c. 2367 of *CIC*/1917, which in two paragraphs distinguished two cases: absolving or pretending to absolve an accomplice proper (§ 1), and absolving or pretending to absolve an accomplice who does not confess to the sin of complicity, but that he does not do it because the confessor himself directly or indirectly induces him or her into doing it (§ 2). The old norm, already grave in itself, was the subject of an interpretive comment by the SCHO, a dicastery with jurisdiction in the matter. On November 16, 1934, the Congregation gave an affirmative response, and added "facto verbo cum SS.mo" to the doubt an "inter inducentes, de quibus in can. 2367 § 2 Codicis I. adnumerandus etiam confessarius qui, sive intra, sive extra confessionem sacramentalem, alicui persuaserit in turpibus inter se patrandis aut nullum aut certe non grave inesse peccatum, eumque consequenter, de aliis tantum sibi postea confitentem, sacramentaliter absolvit vel fingit absolvere."

The interpretation clearly went against the common doctrine of the authors. Fr. A. Vermeersch said, "communis ... sentential ... censebat non contrahi excommunicationem quando sacerdos paenitentem persuaserat turpia inter se committenda non esse ullum vel saltem grave peccatum."[3] Both Fr. Felice Cappello and Fr. Arturo Vermeersch agreed, asserting that this is a broad interpretation because it goes beyond the concept of complicity. Fr. Vermeersch noted: "Complicitas habetur cum sacerdos et altera persona, utriusque sexus, simul conscii gravitatis culpae alterius consentiunt in peccatum externum, grave etiam quam externum, in se libidinosum. Si persona quacum sacerdos peccat ipsa leviter tantum vel nullo modo peccaverit, quia credidit asserenti turpia inter se patranda non esse peccatum, saltem grave, complicitas stricto sensu non habetur."[4] So, the interpretation was maintained only because it was made under a specific mandate from the Supreme Pontiff. Thus, said Cappello, the SCHO's response "mutat doctrinam antiquam, cum sit declaratio vere extensiva seu nova lex; ideoque addita verba 'facto verbo cum SS.mo.'"[5]

The current Code uses few words to describe the offense of absolving an accomplice. The offense is described in c. 1378, along with other offenses committed in celebrating the sacraments. Paragraph 1 is limited to

3. A. Vermeersch–J. Creusen, *Epitome iuris canonici*, II 6th ed. (Rome 1946), no. 570.
4. Ibid.
5. F. M. Cappello, *De Sacramentis*, II, 7th ed. (Rome 1963), p. 388.

establishing that the priest who acts against the provisions of c. 977 incurs *latae sententiae* excommunication reserved to the Apostolic See.

In the 1973 *Schema*, the offense of absolving an accomplice was included in a broader type. In c. 55 § 1,2° of the *Schema*, the text read: "In poena latae sententiae interdicti, vel si sit clericus, suspensionis, incurrit: ... qui, cum sacramentalem absolutionem dare valide nequeat, eam impertire se fingit vel sacramentalem confessionem audit."[6] Some consultors, however, asked that there be a specific offense for absolving an accomplice, since, in the part devoted to the sacrament of penance, there was a specific norm prohibiting absolution of an accomplice under pain of nullity. Although technically it might have been sufficient, the proposed wording was not deemed adequate from a pedagogical point of view. Therefore, a specific description was requested, with a specific penalty. Thus, the current format was arrived at, much simplified and mitigated in comparison with the norm in the preceding Code, with a different paragraph for the offense of absolving an accomplice.[7]

All of this involves a degree of novelty, which can be properly understood if one recalls that the current Code no longer gives any normative value to the Benedictine Constitution; it is neither included nor mentioned. In addition, the wording of c. 1378 § 1 contains not a few novelties, especially with respect to what is omitted. The legislator appears to have been influenced by a general criterion of less rigor, not only in the penal area generally but also in the punishment of offenses against chastity. This is not because he wanted to attribute less gravity and importance to those offenses, but because he deemed that it was no longer suitable to retain the severity of the old legislation. Therefore, the text of the Code should be interpreted according to the criteria offered by the Code itself, primarily in cc. 17 and 18, and specifically regarding the strict interpretation of penal law.

b) *Interpretation of the new legislation*

Some commentators on the new Code have not pointed out those elements of novelty,[8] and some have not even wondered about the problem.[9] On the other hand, there are those who have noticed the novelty and have made it known.

The offense of absolving an accomplice is committed when a priest invalidly imparts absolution to his accomplice in a grave and external sin against the sixth commandment. If there is any reason to give absolution,

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6. *Schema documenti quo disciplina sanctionum seu poenarum in Ecclesia latina denuo ordinatur* (reservatum) (Typis Polyglottis Vaticanis 1973).

7. Cf. *Comm.* 10 (1978), pp. 309ff.

8. Cf. R.A. STRIGL, in *Handbuch des katholischen Kirchenrecht* (Regensburg 1983), p. 942, note 1.

9. Cf. L. CHIAPPETTA, commentary on c. 1378, in *Il Codice di Diritto canonico*, vol. II (Rome 1988); F. NIGRO, commentary on c. 1378, in P.V. PINTO (Ed.), *Commento al Codice di Diritto canonico* (Rome 1985); J. ARIAS, commentary on c. 1378, in *Pamplona Com.*

such as danger of death, absolution is valid and lawful, according to c. 977. In that case, there is no violation of the law or any offense. The assumption of an offense is found in the fact that the person imparting absolution should be a priest empowered to hear confessions, because if he were not, he could not be deprived of that power. If the priest did not have that faculty, it would be a case of the offense provided for in c. 1378 § 2,2°.

It is debatable whether bishops are included among the subjects who incur the penalty. Chiappetta[10] responds positively, because they were included in the preceding legislation. On the other hand, Nigro[11] responds negatively because the Code uses the word *sacerdos*, and penal law must be interpreted strictly (cf. c. 18).

Concerning the scope of the description of the offense, it appears more restricted than in the previous Code. This type of offense no longer applies if a priest only pretends to give absolution. In that case, there is a different type of offense, pretending to administer a sacrament, covered in c. 1379. Even someone who convinces a penitent that his sin is not grave apparently does not commit the offense of absolving an accomplice. To conclude, the offense of absolving an accomplice now only occurs when absolution is given to an accomplice who confesses the sin of complicity. There is no longer anything about pretending to absolve, nor absolving a penitent who has been directly or indirectly induced into confessing the sin of complicity. Not even the broad interpretation given by the Holy Office is included.[12]

The penalty provided for the sin of absolving an accomplice is *latae sententiae* excommunication reserved to the Holy See. The dicastery of jurisdiction is the CDF (cf. c. 1362 § 1,1°).

2. *Offense of attempting to celebrate the Sacrifice of the Holy Mass* (§ 2,1°)

Canon 1378 § 1,1° describes an offense that consists in an attempt by a person who is not an ordained priest to celebrate the Eucharistic sacrifice. The penalty provided is *latae sententiae* interdict or, if the offender is a cleric, *latae sententiae* suspension. This is usurpation of an ecclesiastical function by someone without the necessary requisites. It concerns a matter of great importance in the life of the Church, because it affects the celebration of the Eucharist, which contains all the spiritual goods of the Church, including Christ himself, Pasch of the Church (cf. *PO* 5). For the Church, the Eucharist is sacrifice, sacrament and banquet (cf. c. 897), to which the faithful must pay the highest veneration (cf. c. 898). That veneration is penally protected, as in c. 1367, which more vividly clarifies the

10. Cf. L. CHIAPPETTA, commentary on c. 1378..., cit.
11. Cf. F. NIGRO, commentary on c. 1378..., cit.
12. Cf. J. MANZANARES, in *Nuevo derecho parroquial* (Madrid 1988), p. 287, note 47.

sacramental reality of the Eucharist. Canon 1378 § 2,1° especially takes into consideration the aspect of the sacrifice made in the liturgical act of celebrating Holy Mass.

Canon 900 confirms a doctrine that belongs to the patrimony of the Catholic faith: only a validly ordained priest is qualified to celebrate Mass. Therefore, a deacon and *a fortiori* anyone who does not participate in any way in orders, that is, laymen or persons consecrated in the profession of evangelical counsels, are excluded. This is a question of divine law incapacity, because it does not derive from an ecclesiastical law but from the will of God. Even in a case of dire necessity, the Church will not allow the Eucharist to be celebrated by a member of the faithful who is not a priest. Only a person identified with Christ through ministerial priesthood may work in his name and perform effective sacramental acts (cf. cc. 899 and 900). Canon 900 refers to the celebration *in persona Christi*, for which only a person who has validly received sacerdotal ordination is qualified (*conficere valet*).

From a penal point of view, c. 1378 § 1,2° takes into consideration that norm of divine law. Thus, a person who is not validly ordained as a priest is a likely subject to commit this offense. However, he must be a Catholic because, according to c. 11, canonical penalties affect only Catholic members of the faithful. Just as a member of the faithful who is not a priest cannot celebrate the Eucharist, so any liturgical act of the sacrifice of the Mass performed by anyone who has not been ordained a priest cannot properly be called a celebration; it is only an attempt at celebration, a mere externalization of the liturgical rite effected by someone who is not qualified. It is not properly a celebration, although the rites and ceremonies of the celebration are performed. We can also note that the canon speaks of attempting *liturgicam eucharistici Sacrificii actionem*. The attempt is consummated not only by anyone who completes the rite of celebrating the Mass according to the ritual provided in the liturgical books, but also by anyone who performs an essential part of the liturgical action that constitutes the Eucharistic sacrifice; the liturgical act of the Eucharistic prayer would be sufficient. However, that part at least must happen, because the liturgy calls the part of the celebration that takes place between the Preface and the *Pater noster* the Eucharistic act in the strict sense.

3. *Offense of attempting to give sacramental absolution and hearing confessions* (§ 2,2°)

In § 2,2°, c. 1378 provides for two offenses that run counter to the dignity of the sacrament of penitence or reconciliation, specifically by the minister. Offenses against penitence are relatively numerous in the Code. This may indicate the great care the Church takes to protect, also penally, the dignified celebration of the sacrament; it also illustrates the relative frequency of abuses in celebrating the sacrament or the timing of its

celebration. Pastoral sensitivity leads the Church to take all the necessary precautions to ensure that the sacrament is truly an encounter with our Lord, who pardons and reconciles, not an occasion for further sins. It is especially dependent upon the minister who celebrates the sacrament to ensure that these conditions are met. In the case being considered, the importance of sacred ordination required to celebrate it and due faculties are both emphasized. Anyone who attempts to celebrate the sacrament without sacred ordination or due faculty is punished.

One of the aspects of this offense was already considered in § 1, the offense of absolving an accomplice. By disposition of the Church, a priest is deprived of the faculty to hear confession and to give absolution to an accomplice in a sin against the sixth commandment, according to the norm in c. 977. The offense takes on a double configuration: attempting to absolve and hearing confessions.

a) *Offense of attempting to give absolution*

The reason that someone may be unable to give sacramental absolution validly could be that he is not an ordained priest, or if he is a priest, he may not have the faculty to hear confessions and validly impart absolution. It is useful to remember the statement in c. 965 on the requirement that the minister of penitence must be a priest, and c. 966 § 1, that says, "for the valid absolution of sins, it is required that, in addition to the power of order, the minister has the faculty to exercise that power in respect of the faithful to whom he gives absolution." The power of order is received with sacred ordination; the faculty, "either by the law itself, or by a concession issued by the competent authority in accordance with c. 969" (c. 966 § 2). No one who has not received the power of order can give absolution under divine law. Anyone who has not received the faculty, on the other hand, is not qualified under ecclesiastical law. However, in both cases, absolution is invalid; an action performed contrary to the norm can have absolutely no effect. In canon law, it is called an "attempt" because what the subject can carry out is only an attempted act, not the act itself. The offense consists in the attempt; it is consummated when it meets the legal terms stipulated (cf. c. 1328).

b) *Offense of hearing confessions*

Hearing confessions makes sense only in relation to pardon and reconciliation through sacramental absolution. Furthermore, it makes sense only in relation to the fact that the penitent, in order to be absolved of his sins, must confess them to a minister competent to give absolution (cf. cc. 960 and 988). Confession of sins is made to a sacred minister as a representative of God and the Church and for the purpose of absolution. Therefore, hearing confessions is only possible by someone who is qualified to give absolution because he has both the power of order and the faculty to hear confessions. Thus, one can understand why § 2,2° presents the offenses of attempted absolution and hearing confession by an unqualified

person together. Although they are two different realities, they profane the same sacrament. In any case, in the offense of improperly hearing confessions there is nothing about attempting to hear; it is sufficient that a person who cannot give absolution hear them.

The penalty provided is interdict or, in the case of a cleric, suspension. A cleric may incur the penalty either because he is merely a deacon and therefore without the power of order or the faculty, or because even though he may be a priest he does not have the proper faculty required to hear confessions and to give sacramental absolution.

In the case of the offenses described in § 2, there is the possibility of adding other penalties, depending upon the gravity of the offense; even excommunication is not excluded. Evidently, gravity may be greater for different circumstances, although they are not explicitly listed as aggravating (cf. c. 1326). Actually, the gravity of an offense derives from both the object of the violated law and the subject's imputability. The gravity of a violation of the law may be more or less serious depending upon the number of times it has happened or on the scandal caused in the community. The fact that the possibility of excommunication is specifically mentioned can be explained by the fact that penal legislation is not supposed to threaten too often with censures and especially with excommunication (cf. cc. 1318 and 1349). Finally, if other penalties are medicinal, imposition will be subject to c. 1347; to be validly imposed, there must be prior canonical admonishment.

1379 **Qui, praeter casus de quibus in can. 1378, sacramentum se administrare simulat, iusta poena puniatur.**

A person who, apart from the cases mentioned in Can. 1378, pretends to administer a sacrament, is to be punished with a just penalty.

SOURCES: —

CROSS-REFERENCES: cc. 1344, 1347, 1349–1350

COMMENTARY

Ángel Marzoa

1. *Offenses*

Canon 1378 designates three offenses referring to the proper administration of the sacraments: absolution of an accomplice in a sin against the sixth commandment of the Decalogue except for danger of death, any other attempt to administer the sacrament of penitence, and attempting to perform the liturgical act of the Eucharistic sacrifice without being a priest. By singling out these three cases, the legislator makes them the three gravest offenses in the context of administering the sacraments.

Thus, c. 1379 may be considered a *residual* designation of offenses. A penal sanction is provided for anyone, whether a layperson or a cleric, who pretends to administer a sacrament, with the exception of the offenses described in the preceding canon.

The reference in c. 1379 to c. 1378 is made in the terms "apart from those cases ..." not "apart from the sacraments ..." This means that c. 1379 should not be interpreted to mean that it includes possible simulation in the *other* sacraments, but in the *other* cases. It also includes other possible cases of simulation with respect to the sacrament of the Eucharist, different from those in c. 1378, although not with respect to the sacrament of penitence, since the designation in c. 1378 includes all cases of simulation of that sacrament.

The specific forms of the offenses may be quite varied, as may be the gravity of the offenses. Thus, because the description of the offense is so generic, it is consistent that the penalty provided be indeterminate *ferendae sententiae*. Nevertheless, the following observations should be made:

a) *Simulation* is externally and intentionally performing the rites and ceremonies that are part of the proper and valid administration of a sacrament, but the sacrament does not happen because the author of the

simulation is not qualified, because intention is expressly excluded, or because matter that is valid in appearance only is used.

b) In the case of baptism, since it may be validly and even lawfully administered by anyone (cf. c. 861), there can be simulation only by express exclusion of intention or use of invalid matter.

c) In the case of the Eucharist, the offense may be committed by a priest who attempts to celebrate Mass while expressly excluding the intention to consecrate (if not by a priest, the case would fall under c. 1378 § 2,1°), or by anyone pretending to administer/distribute the Eucharist with hosts that are not consecrated.[1]

d) Simulation of *the sacrament* of marriage occurs when one of the spouses (ministers, both having been baptized) intentionally places an obstacle in the way of or is aware of any obstacle to a valid celebration. This situation not only refer to simulation of the sacrament by simulation of consent (cf. c. 1101), but to any case of awareness of nullity and yet intentionally simulating the ceremony. Simulation in these cases only applies where there is effective *intentio simulandi.*[2]

2. *Penalties*

A preceptive (*puniatur*) but indeterminate (*iusta poena*) *ferendae sententiae* penalty is established. Since the description of the offense is generic, the fact that the penalty is indeterminate is appropriate for the different degrees of gravity that this offense can involve.

To determine the penalty, the judge or superior must keep in mind the criteria established in the general norms on the matter, especially cc. 1344, 1347, 1349, 1350.

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1. Holding the contrary opinion is A. CALABRESE, *Diritto penale canonico* (Milan 1990), pp. 239–240. Our stance is supported by the habitual differentiation that the *CIC* posits between "consecrate/celebrate" and "administer" the Eucharist (cf., e.g., cc. 910, 917–919, 923, 929, 931), likewise in the denomination as "ministers" those who distribute holy communion (c. 910). Sharing this interpretation is L. CHIAPPETTA, *Il Codice di Diritto Canonico* (Naples 1988), p. 511, note 5.

2. Chiappetta, considering only the supposition of simulation of the sacrament through simulation of consent, poses this matter as doubtful, subordinated to the effective inseparability between contract and sacrament and to the consideration of "ministers" of the contractants: cf. *Il Codice*..., cit., p. 512.

1380 Qui per simoniam sacramentum celebrat vel recipit, interdicto vel suspensione puniatur.

A person, who through simony celebrates or receives a sacrament, is to be punished with an interdict or suspension.

SOURCES: c. 2371

CROSS REFERENCES: cc. 1332, 1333 § 1, 1344, 1382

COMMENTARY

Antonio Calabrese, cp.

1. Simony takes its name from Simon Magus, who offered the Apostles money in exchange for the power to give the Holy Spirit. Peter answered him, "Your silver perish with you, because you thought you could obtain the gift of God with money" (Acts 8: 20).

Simony is the sale or purchase of spiritual realities or things related to spirituality, at a temporal price. Jurisdiction can be under divine law or ecclesiastical law. Under divine law, it is the deliberate intention to buy or sell an intrinsically spiritual thing or a temporal thing related to a spiritual thing for a temporal price. Divine law also applies when the spiritual thing is the object (or partially the object) of the contract. Simony under ecclesiastical law occurs when there is a Church prohibition due to the danger of irreverence for spiritual things (cf. c. 727 *CIC*/1917). Therefore, under divine law, simony is much broader, because it includes any type of simony, whereas simony under ecclesiastical law is limited to actions covered or punished by canon law.

Simony under ecclesiastical law is normally also simony under divine law, since actions prohibited by divine law, when prohibited by canon law, become simony under ecclesiastical law. Nevertheless, ecclesiastical law sometimes considers as simony and prohibits certain actions that by their nature are not simony. However, they may appear to be, or run the danger of becoming, simony.

Under divine law, simony is a sacrilege and a mortal sin *ex genere suo toto*, as seen in Peter's terrible words to Simon Magus. Therefore, it cannot be a small matter. Simony under ecclesiastical law includes small matters when the action is not in itself simony, although prohibited by canon law, either because of its appearance or because of the danger of becoming real simony.

Simony can cause great damage to the Church. Because of it, unworthy ministers may be designated or elected, or sacred objects may be entrusted to unworthy or incapable ministers.

2. Simony requires an agreement for valuable consideration, in which a spiritual thing is exchanged for a temporal thing, or vice versa. Agreement is to be interpreted in the broad sense, as any convention (contract, exchange, etc.) in which the simoniacal intention, although not explicitly manifested, can be deduced from the circumstances. The agreement may be expressed, when signified with clear words or signs, or tacit, when someone tries to give a temporal thing with an obligation by the other party to give a spiritual thing as compensation, or vice versa.

Alms offered by the faithful to celebrate Masses, to administer other sacraments, or for other spiritual functions or services are not considered simony when the ordinary or a bishops' conference has set the emolument for the priest. Such offerings are contributions by the faithful to the worthy and honest support of the ministers. The same is true of offerings made by the faithful on those and other occasions. In the words of Jesus (Lk 10: 7) and the Apostle Paul (1 Cor 9:13–14), a priest has the right to be properly supported by the faithful for whom he provides pastoral care.

However, it could be simony if material compensation were required prior to administering the sacraments about which the Church's custom (even the local Church's) has never been to impose any offering or stipend, such as for the sacraments of penance, baptism, or anointing of the sick.

The material goods received through simony may be varied in nature. Generally speaking, they may be any goods that can be acquired with money. Commentators have frequently classified them into three groups: *munus a manu*, which includes material external goods, such as money, precious objects valued for their antiquity, artistry or material; movables, immovables, etc.; *munus a lingua*, which includes any type of patronage, personal protection, praise before superiors, etc.; and *munus ab obsequio*, which includes any type of temporal service, such as transacting business, administering goods, domestic service, etc.

3. Current ecclesiastical law prohibits the provision of ecclesiastical offices by simony (null and void *ipso iure*: c. 149 § 3); the resignation from an office for simony (null and void *ipso iure*: c. 188); and the simoniacal celebration or reception of sacrament, which is the concern of c. 1380.

4. The offense of simony castigated by c. 1380 may be perpetrated in two ways: celebrating a sacrament and receiving a sacrament. It is evident that these are essentially spiritual goods, fundamentally of divine law, and simony in reference to them is also of ecclesiastical law by virtue of c. 1380.

Simoniacal celebration or reception includes any sacrament. The sacrament may have special social relevance, such as in marriage and in sacred orders, administered or received by simony.

A marriage may be celebrated by simony, and a priest or deacon with the faculty to do so may assist canonically by simony. But, since doctrine holds that the priest and deacon are not ministers of the sacrament, a

doubt arises as to whether those sacred ministers, even when committing the sin of simony, also commit the offense designated in c. 1380. However, spouses commit it when they receive the sacrament; in addition, they are also ministers. The canon effectually includes both the person celebrating a sacrament and those who receive it.

Within the sacrament of orders are included episcopate, presbyterate and diaconate. Even the permanent diaconate is included, since it is considered and named as sacred orders or one of the degrees of the sacrament of orders, for example, in cc. 1025 § 1 and 1036, and especially in the play of cc. 1008 and 1009 § 1.

In the past, simoniacal administration and reception were more frequent in episcopates due to the prestige and honor they carried with them, family pride—especially for nobles and powerful people, or the riches and power that went with some episcopal sees.

5. The penalties provided for anyone who celebrates or receives a sacrament by simony are interdict and suspension. These are *ferendae sententiae* penalties that may be inflicted by the judge's sentence in a judicial procedure or by decree of the ordinary in an administrative procedure.

Interdict may be imposed upon any of the faithful, a cleric or a layperson. On the other hand, suspension is a penalty that may be imposed only upon clerics (c. 1333 § 1). If the offender is a cleric, the choice of imposition is at the discretion of the judge or ordinary. Since the canon makes no determination or limitation, suspension may also be total (cf. c. 1334 § 2). In any case, the penalty for the offense of simony is preceptive.

If simony is the cause of administering or receiving the sacrament of the episcopate without a pontifical mandate, the consecrator and the consecrated also incur *latae sententiae* excommunication reserved to the Apostolic See (c. 1382).

1381 **§ 1. Quicumque officium ecclesiasticum usurpat, iusta poena puniatur.**

§ 2. Usurpationi aequiparatur illegitima, post privationem vel cessationem a munere, eiusdem retentio.

§ 1. Anyone who usurps an ecclesiastical office is to be punished with a just penalty.

§ 2. The unlawful retention of an ecclesiastical office after being deprived of it, or ceasing from it, is equivalent to usurpation.

SOURCES: § 1: c. 2394; SCCouncil Decr. *Catholica Ecclesia*, 29 iun. 1950 (*AAS* 42 [1950] 601–602)
§ 2: c. 2401; SCCouncil Decr. *Catholica Ecclesia*, 29 iun. 1950 (*AAS* 42 [1950] 601–602)

CROSS REFERENCES: cc. 145 § 1, 146, 147, 149, 184 § 1, 186, 188, 196 §§ 1–2, 228 § 1, 1149 § 3, 1344, 1349

COMMENTARY

Antonio Calabrese, cp.

The canon covers two ways of usurping an ecclesiastical office: 1) appropriating an office without lawful canonical provision; 2) retaining an office that has been lost by being deprived of it or ceasing from it.

An ecclesiastical office is "any post which by divine or ecclesiastical disposition is established in a stable manner to further a spiritual purpose" (c. 145 § 1). An ecclesiastical office that does not carry with it the exercise of the power of order may also be entrusted to laypersons (c. 228 § 1).

1. "An ecclesiastical office cannot be validly obtained without canonical provision" (c. 146), which is the juridical act, administrative in nature, by which an office is conferred upon a person. Normally, provision involves an ecclesiastical authority with jurisdiction, always a higher authority. An exception would be found in a provision by election that does not require confirmation, but election usually requires confirmation, so, ordinarily a higher ecclesiastical authority must also act in the case.

Provision of an ecclesiastical office may occur by the free conferral of a competent ecclesiastical authority using the following methods: by institution, which is the act by which the authority with jurisdiction gives effect, consistency, and confirmation to the presentation made by

someone with that right; by confirmation of an election by another body, for example, a chapter; by admission of postulation if the candidate had an impediment; or finally, by simple election with acceptance by the one elected, with no confirmation required from any other authority (cf. cc. 147 and 180 § 1).

Thus, anyone who occupies an ecclesiastical office without canonical provision usurps the office, especially when it is already rightfully and lawfully covered by another person, or when another person has been lawfully named, even if that person has not taken canonical possession of it. It appears that anyone who lacks the requisites required *ad validitatem* to occupy an office also usurps it. Therefore, anyone who has obtained an office by simony usurps it, for simoniacal provision is null and void *ipso iure* (c. 149 § 3). Similarly, anyone who is not a priest and occupies an office that carries with it the full care of souls is also a usurper, since an office of that nature cannot validly be conferred upon anyone who is not a priest, even if he is a transitional or permanent deacon (c. 150).

2. Unlawful retention of an office is the equivalent of usurpation. No one who has been deprived of office, or for any reason has lost it, can continue to occupy it. If he does so, by the express disposition of the norm in c. 1381, he occupies it unlawfully.

Deprivation of office is an expiatory penalty (c. 1336 § 1, 2). It assumes that an offense has been committed and can be imposed only in accordance with penal norms. Otherwise, it has no effect (c. 196 § 1–2). It is therefore assumed that this canon deals with imposed deprivation, according to the law. Among other things, if the expiatory penalty is perpetual, it cannot validly be imposed by decree or administrative procedure, but only by a sentence concluding a judicial procedure (c. 1342 § 2).

Cessation in office may occur for various reasons: lapse of the predetermined time period, reaching the age determined by law, and resignation, transfer, or removal, as well as deprivation (c. 184 § 1).

When the predetermined time has elapsed or the predetermined age limit has been reached, loss of office is not automatic. It becomes effective only from the time of written notice from the authority of jurisdiction (c. 186). However, according to continuing practice, loss of a superior's office in religious institutes is automatic when the time has elapsed, unless otherwise established.

A resignation made because of grave fear unjustly inflicted, deceit, error of substance, or simony is null and void *ipso iure* (c. 188).

However, anyone who has lost an office for one of the causes provided by law, and continues to retain it, does so unlawfully and commits the equivalent offense of usurpation, punished by this norm.

3. The penalty provided is preceptive but indeterminate. In any case, it is a *ferendae sententiae* penalty. The judge or ordinary decides the proper penalty depending upon the circumstances and keeping in mind that under c. 1349 more serious penalties should not be chosen unless there are circumstances such as obstinacy in unlawful possession, scandal, mobilization of the faithful, or manifest rebellion against lawful authorities. In such cases, according to c. 1349, heavier penalties—never perpetual—including censures, may be imposed.

1382 Episcopus qui sine pontificio mandato aliquem consecrat in Episcopum, itemque qui ab eo consecrationem recipit, in excommunicationem latae sententiae Sedi Apostolicae reservatam incurrunt.

Both the bishop who, without a pontifical mandate, consecrates a person a bishop, and the one who receives the consecration from him, incur a *latae sententiae* excommunication reserved to the Apostolic See.

SOURCES: c. 2370; SCHO Decr. *Suprema Sacra*, 9 apr. 1951 (*AAS* 43 [1951] 217–218); SCDF Decr *Episcopi qui alios*, 17 sep. 1976 (*AAS* 68 [1976] 623)

CROSS REFERENCES: cc. 1013, 1014, 1329, 1331 § 2, 1364 § 1

COMMENTARY

Antonio Calabrese, cp.

1. According to c. 1013, "no bishop is permitted to consecrate anyone as bishop, unless it is first established that a pontifical mandate has been issued." Without the mandate, consecration is illicit, but valid. Because it is valid, the consequences are most grave:

a) an old norm is violated, to which the Church has always given the greatest importance, because hierarchical communion is broken. The consecrated bishop is excluded from hierarchical communion with the Roman Pontiff, Head of the College of Bishops and other members of the College (*LG* 22);

b) the consecrated bishop cannot receive the *missio canonica* for any pastoral ministry (*LG* 24);

c) the consecrated and the consecrator both incur *latae sententiae* excommunication, reserved to the Apostolic See.

2. There must be certainty about the pontifical mandate. Certainty may be obtained in various ways without the actual document. The norm requires only that the existence of the mandate must be confirmed (*nisi prius constet*), not that the document be in the hands of the consecrator.[1] Nevertheless, the document normally constitutes certain proof of the mandate. However, when there is confirmation of the mandate, but the

1. Cf. SCPF, December 30, 1787, in P. GASPARRI-I. SEREDI, *Codicis Iuris Canonici Fontes*, no. 4588.

document cannot be sent (for example, in countries where the Church is persecuted), consecration is valid and licit. Moreover, it may even be necessary to consecrate without documentation present to ensure apostolic succession and the ordination of presbyters.

3. Both the consecrating bishop and the consecrated bishop without a pontifical mandate incur *latae sententiae* excommunication reserved to the Apostolic See.

The norm punishes the consecrating bishop, but it does not mention the co-consecrating bishops or assisting presbyters, nor do other documents currently in effect refer to the assisting presbyters. In c. 2370 *CIC*/1917, the penalty of suspension is provided for the consecrating bishop, the assisting bishops, and the presbyters assisting "in place of the bishops," as well as for the consecrated bishop. In a decree of April 9, 1951, the SCHO provided *latae sententiae* excommunication reserved *specialissimo modo* to the Apostolic See[2] for the consecrating and the consecrated bishop, but it did not extend the penalty to the co-consecrating bishops or the assisting presbyters. Therefore, it must be concluded that the co-consecrating bishops and the assisting presbyters normally do not incur the penalty. However, if such a consecration, whatever the particular circumstances, signifies a schism, then everyone, including the bishops and presbyters mentioned, incurs unreserved *latae sententiae* excommunication (c. 1364 § 1).

4. It is assumed as a necessary condition that the consecrating bishop has been validly consecrated. Doubt regarding this matter is well founded when the consecrating bishop belongs at least externally to a religious confession or sect of the Catholic Church in which apostolic succession may be lacking or be doubtful in the episcopal hierarchy. If it is ascertained that the consecrator is not validly consecrated, the case does not fall under c. 1382 (cf. c. 1379). If the case signifies a schism, it is the offense punished with the *latae sententiae*, but not reserved, excommunication of c. 1364 § 1.

5. In this case and for the effects of reservation, the Apostolic See means the CDF (*PB* 52), which, on March 12, 1983, reaffirmed the prescriptions in its preceding decrees, in particular in the decree of September 17, 1976.[3] It established that the Church did not, and would not, recognize the ordination of anyone who had received or might receive episcopal ordination without a pontifical mandate. It established that, for all purposes, the affected subjects would remain in the condition they had been in before consecration, in addition to the penalties they had incurred.[4]

2. *AAS* 18 (1951), pp. 217–218.
3. *AAS* 68 (1976), p. 623.
4. *AAS* 75 (1983), pp. 392–393.

Although the penalty is automatically incurred without any intervention from the Apostolic See, nevertheless, in cases that cause scandal, shock, discomfort, or disturbance and harm among the faithful—an easy matter when the event is publicized by the press and other means of social communication—or if the case signifies opposition to the Apostolic See or dissension or schism in communion with the Catholic Church, then the Holy See usually declares the penalty.

Such a declaration is not usually a declaratory sentence that concludes a penal judicial procedure, but an extrajudicial decree made outside the penal process. However, it may also be made following a judicial procedure. In those cases, it has particular effects (cf. c. 1331 § 2).

6. To obtain remission of the penalty in external cases, recourse must be had to the CDF. In occult cases, which remain in the internal forum, recourse to the Apostolic Penitentiary may be made, either directly or through a confessor. The confessor transmits the case *reticito nomine* of the penitent and in due time informs him of the Apostolic Penitentiary's response and mandates.

The Apostolic See usually does not agree to allow a person consecrated without a pontifical mandate to exercise episcopal functions or act like a bishop. At most, it permits the consecrated person to act like a presbyter with no episcopal prerogatives or external signs, in accordance with the statement of the CDF of March 12, 1983, cited above.

1383 Episcopus qui, contra praescriptum can. 1015, alienum subditum sine legitimis litteris dimissoriis ordinavit, prohibetur per annum ordinem conferre. Qui vero ordinationem recepit, est ipso facto a recepto ordine suspensus.

A bishop who, contrary to the provision of Can. 1015, ordained someone else's subject without the lawful dimissorial letters, is prohibited from conferring orders for one year. The person who received the order is ipso facto suspended from the order received.

SOURCES: cc. 2373,1°, 2374; SCDF Decr. *Episcopi qui alios*, 17 sep. 1976 (*AAS* 68 [1976] 623)

CROSS REFERENCES: cc. 1015, 1020, 1022–1023, 1050–1052, 1336 § 1, 3°

COMMENTARY

Antonio Calabrese, cp.

1. This norm punishes violations of the provisions in c. 1015 (cf. c. 1022). Paragraph 1 provides that every candidate must be ordained a deacon or presbyter by the proper bishop or with the bishop's lawful dimissorial letters. In other words, no bishop may ordain someone else's subject a deacon or presbyter on his own initiative. However, a bishop may authorize another to confer orders on his subject in his own territory or elsewhere. In that case, dimissorial letters are necessary; they are the documents in which a bishop authorizes his subject to receive orders from another bishop and, at the same time, authorizes the other bishop to confer the orders. Dimissorial letters should not be granted if the bishop has not collected the certificates and documents prescribed by law. In the dimissorial letters, the bishop certifies that all required procedures have been followed and that the required documentation has been submitted (cc. 1020, 1050–1052).

Dimissorial letters for a religious or a member of a society of apostolic life who is to be ordained deacon or presbyter are issued by the proper superior, generally a major superior, who must certify in the letters that the subject is definitively enrolled in the institute or society in question and is subject to his authority (cc. 1019, 1052 § 2).

If the bishop has specific doubts about whether the candidate is suitable, the law expressly establishes that he must not promote him (c. 1052 § 3). The reasons (*ob certas rationes*) should be a sufficient basis for doubt.

2. For ordination to the diaconate of those who intend to enroll themselves in the secular clergy, the proper bishop is the bishop of the diocese in which the aspirant is resident, or the bishop of the diocese to which he intends to devote himself. If a candidate has already been ordained a deacon in the secular clergy, the proper bishop is the bishop of the diocese in which the candidate was incardinated by the diaconate (c. 1016).

For religious and members of societies of apostolic life, dimissorial letters are required, even though the candidate may be in the territory of the ordaining bishop, or if the bishop is also a religious in the same institute or a member of the same society, or even if he lives in the same house.

Any bishop may confer orders even if he is from a different diocese from the diocese where the candidate resides, or if he is a titular bishop or a bishop emeritus.

3. A bishop who ordains another's subject without dimissorial letters incurs the penalty. However, the letters are only a document stating the suitability of the candidate and giving his bishop's authorization. If the candidate's own bishop verbally states that he is suitable and gives his authorization, the ordainer should incur no penalty, although both are acting against the explicit provision of the law. Neither would the person ordained incur a penalty.

4. The *prohibition* incurred by the ordaining bishop is not, as it might appear at first, a disciplinary and pastoral measure outside of penal law, but a true penalty. It is a *latae sententiae* penalty that prohibits conferring orders for one year. However, because the time of the prohibition is specified, this does not appear to be a medicinal penalty whose duration, by its very nature, would end upon cessation of contempt (c. 1358).

It is not clear whether *order* means any degree of the sacrament of orders, so that a bishop may not confer any order although he only ordained without letters dimissory in one of the degrees, for example, the diaconate. Perhaps it should be understood only to mean the order conferred without letters, leaving the bishop free to confer the other degrees. In practice, in case of doubt, the mildest opinion may be followed, since this is a question only of liceity, not the validity of the order conferred.

If the dimissorial letters are forged by the candidate or any one else, a bishop who ordains in good faith commits no offense nor incurs the penalty, but a candidate who has procured the forgery or at least knew about it incurs the penalty. The person who forged the letters is guilty of the offense of falsification of an ecclesiastical public document as provided and punished with a *ferendae sententiae* penalty in c. 1391.

5. The situation and the penalty are graver for a person ordained without dimissorial letters. He is suspended *ipso iure* from the order received. This is a censure of suspension, but it refers only to exercising the

order received without dimissorial letters, not to any degree of orders that may have been received earlier. For example, a lawfully ordained deacon who was ordained a presbyter without dimissorial letters is suspended from exercising priestly duties, but is free to exercise diaconal ministry. Concerning a bishop's consecration, dimissorial letters are not required. A pontifical mandate is required; without it, the consecrated bishop and the consecrator incur *latae sententiae* excommunication, reserved to the Apostolic See (cf. c. 1382). This means that the consecrated bishop cannot exercise presbyteral or diaconal ministry (c. 1331 § 1).

The suspension of a person ordained without dimissorial letters has no time limitation. The suspension, because it is medicinal, cannot be perpetual nor *ad tempus* because it must be remitted (c. 1358) once the offender has ceased in his contempt (cf. c. 1347 § 2). In this case, it is unclear how contempt can cease, or even if there is contempt after the offense is consummated.

In any case, it seems that the penalty ceases if the person who received the order was not incardinated and finds a bishop who will incardinate him and permit him to exercise the order. It also ceases if he finds a major superior who permits him to enter the institute or transfer to his institute if the ordained person were a religious in another institute or member of a society of apostolic life, and the superior permits him to exercise the order. Finally, it ceases if his own bishop or major superior permits him, in spite of what has happened, to exercise his order. Otherwise, the ordained person is doomed to remain suspended in perpetuity. It seems, therefore, that the penalty of suspension in this case is an exception to the general rule and cannot be considered a purely medicinal penalty.

Should a deacon ordained without dimissorial letters who cannot find a bishop or institutional superior to receive him be considered as belonging to the *coetus clericalis* as his juridical state? Should he be considered a vagus (wandering) cleric?

1384 **Qui, praeter casus, de quibus in cann. 1378–1383, sacerdotale munus vel aliud sacrum ministerium illegitime exsequitur, iusta poena puniri potest.**

A person who, apart from the cases mentioned in Cann. 1378–1383, unlawfully exercises the office of a priest or another sacred ministry, may be punished with a just penalty.

SOURCES: c. 2322,2°

CROSS-REFERENCES: cc. 1343–1344, 1347, 1349–1350

COMMENTARY

Angel Marzoa

1. *Offenses*

Canons 1378–1383 cover various offenses related to the sacraments and ecclesiastical offices. Canon 1384 includes any "unlawful exercise of the office of priest or another sacred ministry" not covered in the canons preceding it. As Arias comments, "given the special importance this matter has for Church life, the legislator has chosen to penalize any misuse in the exercise of the sacred ministry."[1] Actions that may fall under this canon include the practice of general absolution (cf. cc. 961–962), canonical assistance at marriage (cf. cc. 1066–1067, 1071), granting Church funeral rites (cf. c. 1184), the performance of parish functions by church rectors, Sunday celebrations in the absence of the presbyter directed by non-ordained faithful,[2] and so on (cf. c. 558).[3]

2. *Penalties*

For all these offenses, the penalty established is indeterminate (*iusta poena*), facultative (*puniri possunt*) and *ferendae sententiae*.

1. J. ARIAS, commentary on c. 1384, in *Pamplona Com.*
2. EdM, 7 § 2: the phenomenon described by this Instruction would be the insertion into the structure of the celebration of "elements of the sacramental liturgy, especially the 'eucharistic prayer', even if it is only in narrative form. In the note, the document expressly refers to cc. 1378 and 1384.
3. We take these examples from L. CHIAPPETTA, *Il Codice di Diritto Canonico* (Naples 1988), p. 514.

Some consultors noticed that this offense was very general, especially with respect to the term *sacrum ministerium*. Still, it was considered that there was no risk because of the facultative nature of the penalty *sive quoad entitatem sive quoad ipsam applicationem.*[4]

In determining the penalty, the judge or superior must take into account the criteria established in the general norms on the matter, especially cc. 1344, 1347, 1349 and 1350. With respect to the facultative nature of the penalty, the provisions of c. 1343 must be kept in mind.

4. Cf. *Comm.* 9 (1977), p. 311.

1385 Qui quaestum illegitime facit ex Missae stipe, censura vel alia iusta poena puniatur.

A person who traffics for profit in Mass offerings is to be punished with a censure or other just penalty.

SOURCES: c. 2324

CROSS-REFERENCES: cc. 945–958, 1344, 1347

COMMENTARY

Ángel Marzoa

1. *Offenses*

In cc. 945–958, a number of provisions are detailed that try to preserve the original sense of offerings made by the faithful at the celebration of Holy Mass, so as to distance it from even the semblance of trafficking or trading (c. 947). The Church does not want the least suspicion connected with the sacrament, to which this matter is closely linked.[1]

Since the description of the offense is open-ended but refers to specific legal provisions ("Qui quaestum illegitime facit ...") A person who traffics for profit ..."), one must look at cc. 945–958 to clarify the offense involved. The following are examples of the offense[2]:

— retaining more than one offering a day (cf. c. 951);

— requiring a greater amount than what has been set (cf. c. 952);

— accepting more offerings for Masses to be celebrated than one priest can discharge within a year (cf. c. 953);

— not proceeding properly in transferring the celebration of Masses accepted to other priests (cf. c. 955);

— neglect in recording Masses accepted (cf. c. 958);

— improperly combining intentions in a single Mass (cf. c. 948).

With respect to the last example, the *Decree* of the CC of February 22, 1991[3] must be kept in mind; it regulates the practice of *collective* Masses, giving special attention to the abuses in this matter. If we look at

1. Cf. A. MARZOA, commentary on chap. III of book IV, part I, tit. III, in *Pamplona Com*, p. 573.
2. We owe a substantial debt here to L. CHIAPPETTA, *Il Codice di Diritto Canonico* (Naples 1988), p. 515.
3. The *Decree* was approved *specifically* by the Roman Pontiff, and published in *AAS* 83 (1991), pp. 443–446.

the contents (see commentary on c. 948), in addition to the last example above, we find the following behavior susceptible to penal sanction:

— celebrating more than two *collective* Masses in a week (art. 2 § 2);

— retaining the amount of more than one offering from the offerings received to celebrate a *collective* Mass (art. 2 § 1, in relation to cc. 950 and 951 § 1).

2. *Penalties*

The textual history of the canon reveals the Church's attitude on the gravity of this offense. Although in the first *Schema* the punishment was expressed as an indeterminate and facultative penalty ("iusta poena puniri potest"[4]), there was a petition that was immediately accepted, and the sanction was increased. Therefore, when a censure was suggested, it became a preceptive, semi-determinate penalty.[5]

Therefore, a semi-determinate, preceptive ("*puniatur*") *ferendae sententiae* penalty was established. It is semi-determinate because of the indication that the penalty should be a censure or other just penalty. In view of the restriction in c. 1349 on censures, the criterion must be to impose a censure (cc. 1331ff) if the seriousness of the case clearly demands it. If it is unnecessary to have recourse to censures, an adequate expiatory penalty (cc. 1336ff) must be imposed. If the penalty chosen is a censure, the requirement of previous admonishment (cf. c. 1347) must be observed *ad validitatem*.

With respect to the preceptive nature of the penalty, the provisions of c. 1344 must be kept in mind.

In any case, the preceptive nature of the penalty must be evaluated in light of c. 947: "*omnino arceatur*" any appearance of trafficking or profit. The duty of vigilance falls mainly on the local ordinary in churches of the secular clergy, and on the superior for churches of religious institutes and societies of apostolic life (cf. c. 957). Finally, art. 6 of the abovementioned *Decree* emphasizes the duty of diocesan bishops not only to give out the norms but also to see that they are followed.

4. Code Commission, *Schema Documenti quo disciplina sanctionum seu poenarum in Ecclesia latina denuo ordinatur* (Typis Polyglottis Vaticanis 1973), p. 29, c. 59.

5. Cf. *Comm.* 9 (1977), p. 311.

1386 Qui quidvis donat vel pollicetur ut quis, munus in Ecclesia exercens, illegitime quid agat vel omittat, iusta poena puniatur; item qui ea dona vel pollicitationes acceptat.

A person who gives or promises something so that some one who exercises an office in the Church would unlawfully act or fail to act, is to be punished with a just penalty; likewise, the person who accepts such gifts or promises.

SOURCES: c. 2407

CROSS REFERENCES: cc. 1344, 1349, 1456, 1457, 1489

COMMENTARY

Antonio Calabrese, cp.

1. This canon punishes bribery and the consequent corruption of a person who exercises a function (*munus*) in the Church in such a way that he unlawfully acts or fails to act in discharging that function. Therefore, an essential element of bribery is the malicious intent to corrupt. Corruption, in this context, also cannot occur without two parties acting. Thus, it is *active* on the part of the person who gives or promises to pay in any way to obtain an unlawful act or failure to act. It is *passive* on the part of the person who allows himself to be corrupted and accepts gifts or promises.

2. An offense occurs when delivery or promise precedes the act or failure to act, with explicit or implicit agreement to obtain an act or failure to act in exchange. An essential element of the offense is malice or malicious intent to corrupt, which may be manifested in various ways; for example, anyone who offers something that ought not to be offered, implicitly or virtually, intends to corrupt.

Active corruption is committed by the mere fact of the gift or promise to obtain something, even if the person to whom it is offered does not consent. In that case, only the corrupter commits an offense. If the other person consents, he also commits the offense, and there is passive corruption.

There is also corruption if a person makes a promise, even if he does not keep it, regardless of whether the unlawful act or failure to act occurs. There is also corruption even if the person accepting does not carry out the unlawful action he agreed to perform.

However, it is not corruption or bribery to reward after the fact, if there is no prior accord—even implicit—as a sign of gratitude or friendship to the person who unlawfully did or failed to do something.

3. As the norm expressly states, the act or failure to act must be unlawful. Otherwise, there is no offense either by the person who gives or promises something or by the person who accepts it. In this, canon law differs from nearly all civil penal law. There are, however, cases when canon law absolutely prohibits accepting gifts. For example, officers of the tribunal are prohibited from accepting any gift on the occasion of a trial (c. 1456). In that case, malicious intent to corrupt on the part of the briber is assumed by the law or, at the least, it seems that the risk of corruption is deemed imminent. For example, in matrimonial causes, offering and accepting gifts is always considered bribery or at least it raises the suspicion of bribery. However, canon law provides no penalty for either the giver or the accepter, unless during or after the trial the accepter causes harm to the other participants or breaches the law of secrecy. In other words, the acceptor performs an unlawful action or unlawfully fails to perform; this is punishable even without bribery and may be maliciously caused by bribery. In such a case, the offender may be punished by the authority of jurisdiction with the proper penalties, not excluding loss of office (c. 1457 §§ 1–2), but he may also fall under the sanctions provided in c. 1386 if corruption is proved.

Similarly, under c. 1489, advocates and procurators who betray their office because of gifts, promises or any other consideration must be suspended from exercising their profession and be fined or punished with other suitable penalties. Advocates and procurators who have accepted bribes are severely punished under c. 1489, not c. 1386. However, the bribers can be punished under c. 1386. All we have said about judges and any officers of the tribunal also holds in matrimonial causes, especially for advocates and procurators.

4. The penalty is preceptive, but indeterminate: "*iusta poena puniatur.*" Moreover, it is *ferendae sententiae*; it must be imposed by a judge or the ordinary, depending upon whether the judicial or extrajudicial route is followed.

The Code makes no distinction between the person who bribes and the person who is bribed; both are to be punished with a just penalty. Nevertheless, since imputability may vary in each of the subjects, it is the judge or ordinary who decides the just penalty for each.

Although bribery and corruption are among the offenses in the Code for which an indeterminate penalty is provided, in today's civil society, which is especially sensitive to social justice, they are considered grave offenses and are severely punished. For that reason, when determining penalties, ecclesiastical judges and ordinaries must respect the basic option written into the Code (cf. c. 1349) and take into account social sensitivity, which has increased in ecclesial society.

1387 **Sacerdos, qui in actu vel occasione vel praetextu confessionis paenitentem ad peccatum contra sextum Decalogi praeceptum sollicitat, pro delicti gravitate, suspensione, prohibitionibus, privationibus puniatur, et in casibus gravioribus dimittatur e statu clericali.**

A priest who in confession, or on the occasion or under the pretext of confession, solicits a penitent to commit a sin against the sixth commandment of the Decalogue, is to be punished, according to the gravity of the offence, with suspension, prohibitions and deprivations; in the more serious cases he is to be dismissed from the clerical state.

SOURCES: c. 2368 § 1

CROSS REFERENCES: c. 1390

COMMENTARY

Velasio De Paolis, cs.

This offense was established in c. 2368 of *CIC*/1917 with a reference to c. 904, which itself went back to the Constitution *Sacramentum Poenitentiae* of Benedict XIV, dated June 1, 1741, a document that *CIC*/1917 included as an appendix and admitted as an integral part of the Code. The present-day Code does not refer to Benedict's constitution. Its silence should be interpreted under c. 6 § 1,3°, cc. 17 and 18, and c. 1313. This offense should also be read in relation to c. 1390 (see commentary).

Jurisdiction over the subject matter of this canon falls to the CDF (cf. c. 1362 § 1,1°; and *PDV* 48 and 52).

The offense is designed to punish any solicitation to commit a sin against the sixth commandment during the sacrament of penance. The Church considers it particularly grave that this sacrament, the sacrament of pardon and peace, may be an occasion for evil. A confessor, who should be father, teacher, and doctor (cf. c. 978), cannot become a wolf who pulls sheep down and scatters them.

The current description of the offense is much simpler than the preceding Code and the Benedictine constitution. However, there can be no doubt that it includes any solicitation to sin against the sixth commandment. The offense consists in soliciting to break the sixth commandment in any way, even if the penitent does not succumb to the temptation.

Any priest may be the subject of the offense, but there is a lack of agreement as to whether bishops should be included. Chiappetta responds affirmatively[1] because they were included in the previous legislation. Nigro responds in the negative, "by virtue of the hermeneutic principle that imposes a strict interpretation of penal norms."[2] Regardless, priests who solicit on the occasion of confession commit the offense even if they are not empowered to hear confessions; the text says simply "*sacerdos*." It also well fits the spirit of the law.[3]

The penalties provided are all *ferendae sententiae*, ranging from suspension to dismissal from the clerical state. Depending upon its gravity, the offense may also be punished with other prohibitions and deprivations. Recidivism has great importance (cf. c. 1327). Except for suspension, the other penalties are expiatory. Expulsion from the clerical state requires a judicial trial with a collegiate tribunal of three judges (cf. c. 1425 § 1,2°) because it is a perpetual penalty (cf. c. 1342 § 2).

According to *CIC*/1917, the penitent was obliged to denounce the soliciting confessor (cf. c. 904 *CIC*/1917), following the praxis of the Constitution *Sacramentum Poenitentiae* of Benedict XIV of June 1, 1741. Furthermore, a confessor could not absolve a penitent who refused to comply with the obligation. However, to rigorously forestall false denunciations, in c. 894 *CIC*/1917, the legislator made reservation for the sin of false accusation of solicitation before ecclesiastical judges. Also, c. 2363 *CIC*/1917 provided for the offense of false accusation of solicitation and punished it severely (cf. c. 1390 § 1).

The current Code no longer imposes an obligation to denounce the soliciting priest. This question is regulated according to the principles of moral theology.[4] Canon 982 prohibits absolving a penitent who has falsely denounced a confessor unless that person has first formally withdrawn the false denunciation and is prepared to make good whatever harm may have been done.

1. Cf. L. CHIAPPETTA, in *Il Codice di Diritto canonico*, vol. II (Rome 1988), p. 516.
2. F. NIGRO, commentary on c. 1387, in P.V. PINTO (Ed.), *Commento al Codice di Diritto canonico* (Rome 1985).
3. Cf. J. ARIAS, commentary on c. 1387, in *Pamplona Com.*
4. Cf. *Comm.* 10 (1978), p. 65.

1388 **§ 1. Confessarius, qui sacramentale sigillum directe violat, in excommunicationem latae sententiae Sedi Apostolicae reservatam incurrit; qui vero indirecte tantum, pro delicti gravitate puniatur.**

§ 2. Interpres aliique, de quibus in can. 983 § 2, qui secretum violant, iusta poena puniantur, non exclusa excommunicatione.

§ 1. A confessor who directly violates the sacramental seal incurs a *latae sententiae* excommunication reserved to the Apostolic See; he who does so only indirectly is to be punished according to the gravity of the offence.

§ 2. Interpreters and the others mentioned in Can. 983 § 2, who violate the secret, are to be punished with a just penalty, not excluding excommunication.

SOURCES: § 1: c. 2369 § 1; SCHO Decr. *Cum ex expresso*, 21 iul. 1934 (*AAS* 26 [1934] 550)
§ 2: c. 2369 § 2; SCDF Decl., 23 mar. 1973 (*AAS* 65 [1973] 678)

CROSS REFERENCES:

COMMENTARY

Velasio De Paolis, cs.

Canon 1388 treats two types of offenses, one against the sacramental seal and the other against the secret derived from the subject matter of confession. In comparison with *CIC*/1917, the Code says nothing new on the norms that refer to the seal and the secret in relation to the sacrament of confession or the penalties provided for offenders. However, from a terminological point of view, the new legislation clearly distinguishes the obligation of the seal from the obligation of the secret. The obligation of the seal refers only to the confessor and concerns the subject matter of the confession (cf. c. 983). This is an absolute obligation because it affects knowledge that the confessor has received *in foro Dei*. The secret, on the other hand, refers to interpreters or other persons who may come to know the subject matter of the confession. Canon 984 contains the prohibition against using knowledge acquired from a confession to the harm of the penitent, although any danger of revelation is excluded.[1]

1. Cf. V. DE PAOLIS, "De delictis contra sanctitatem sacramenti Paenitentiae," in *Periodica* 79 (1990), pp. 177–218.

1. *Violation of the sacramental seal* (§ 1)

Under c. 983, a confessor has the obligation of the sacramental seal concerning sins heard in confession, and the obligation not to use the knowledge acquired in confession, even though there is no danger of revelation. These two grave obligations admit of no exception.

Regarding the object of the seal, doctrine distinguishes between what is essential and what is accidental. The essential object is all sins heard in a penitent's confession, including sins of both the penitent and other persons, mortal or venial sins, occult or public, if they are revealed for the purpose of absolution and have been heard by the confessor by virtue of sacramental knowledge.

Direct violation of the sacramental seal occurs when a confessor reveals the object of the sacramental seal together with the name of the person who committed the sin. *Indirect* violation occurs when the matter revealed is the object of the seal together with the circumstances, which carry the danger of revealing the name of the sinner or raising suspicion about him or her.

Canon 1388 § 1 distinguishes between a direct and an indirect violation. The subject of both is the priest, because only a priest is the subject of the sacramental seal. For the offense of direct violation, the penalty is *latae sententiae* excommunication reserved to the Holy See. For the offense of indirect violation, the penalty is an obligatory indeterminate *ferendae sententiae* penalty. The specific penalty must be measured according to the gravity of the offense.

2. *Violation of the secret which proceeds from confession* (§ 2)

Other persons, including interpreters, who learn about confessed sins are not obligated by the seal, but by the obligation to never reveal for any reason what they have learned. Anyone who violates the secret commits the offense, which is punished with an obligatory indeterminate penalty that may include excommunication (cf. c. 1349).

In tune with an analogous decree of 1973 and by virtue of special faculties received from the Holy Father (cf. c. 30), the CDF established that anyone who himself or through others records what a confessor or penitent says in a true or feigned sacramental confession or divulges it through means of social communication shall incur *latae sententiae* excommunication.[2]

2. Cf. *AAS* 80 (1988), p. 1367.

1389 **§ 1. Ecclesiastica potestate vel munere abutens pro actus vel omissionis gravitate puniatur, non exclusa officii privatione, nisi in eum abusum iam poena sit lege vel praecepto constituta.**

§ 2. Qui vero, ex culpabili neglegentia, ecclesiasticae potestatis vel ministerii vel muneris actum illegitime cum damno alieno ponit vel omittit, iusta poena puniatur.

§ 1. A person who abuses ecclesiastical power or an office, is to be punished according to the gravity of the act or the omission, not excluding by deprivation of the office, unless a penalty for that abuse is already established by law or precept.

§ 2. A person who, through culpable negligence, unlawfully and with harm to another, performs or omits an act of ecclesiastical power or ministry or office, is to be punished with a just penalty.

SOURCES: § 1: CodCom Resp. VI, 2–3 iun. 1918 (*AAS* 10 [1918] 347)

CROSS REFERENCES: cc. 1336 § 1,2°, 1344, 1349

COMMENTARY

Ángel Marzoa

The 1917 Code devoted an entire title to offenses arising from abuse of ecclesiastical power or office (cc. 2404–2414). The current canon classifies cases of "abuse" (§ 1) and "negligence" (§ 2) not expressly covered in any other penal norm.

In the 1973 *Schema*, only the offense of "abuse of power or office" was included (that is § 1 of c. 1389 with the genitive *delicti* in place of the current *actus vel omissionis*).[1] After the *animadversiones* on it, a new text was drawn up with express mention of acts or omissions as an abuse of power or office. In § 2, it added culpable negligence and met the requirement of c. 1321 § 2 for the punishability of this type of offense (see commentary on c. 1321).[2]

1. Cf. Code Commission, *Schema Documenti quo disciplina sanctionum seu poenarum in Ecclesia latina denuo ordinatur* (Typis Polyglottis Vaticanis 1973), p. 29, c. 63.
2. Cf. *Comm.* 9 (1977), pp. 312–313.

1. *Offenses*

a) *Malicious* offense (§ 1): Abuse through act or omission of ecclesiastical power or office. Because there are specific penalties for them, offenses from these canons are excluded: cc. 1378 § 1, 1382, 1383, 1387, 1388, 1396; also the *extravagantes* from cc. 1457 and 1741,4°. In addition, any other offense expressly penalized by a universal or particular norm is excluded.

The designation of the offense is sufficiently broad to include any arbitrary behavior in exercising public power in the Church (of order and/or of jurisdiction), or in performing an office.

It must be kept in mind that the expression *post* (*munus*) is broader than *office* (cf. c. 145: "*Officium... est quodlibet munus...*, "), and may be extended to cover any *munus*, even if it has not been *stabiliter constitutum.*

By juxtaposition with § 2, for there to be an offense, it is unnecessary for the abuse of power or office to be followed by specific harm to others.

b) *Culpable* offense (§ 2): Unlawful commission or omission, through culpable negligence, of an act of ecclesiastical power, ministry or other office with harm to another. This is the only culpable offense penally designated as such in the *CIC* (cf. c. 1321 § 2).

In addition to the social harm that results from the commission of any offense, there must also be effective harm to a third party. The harm must be observable in the external forum, for it must be proved to determine that the offense has been consummated.

With respect to ecclesiastical power and office, see *supra* the remarks on the malicious offense. However, this type of offense also includes *ministry* (*ministerium*). By *ministry,* the legislator intends to include administration of the sacraments and preaching the word of God, which are especially susceptible to negligence. This obviates any difficulty in interpreting what might be derived from trying to include or exclude this principal ministry from the concepts of *potestas* or *munus.*

The expression "culpable negligence" should be understood in the sense of *imputable* (see commentary on c. 1321). Since this is the designation of a criminal offense, it is unnecessary to mention culpability, for that is implicit in the concept of *culpable offense.*

It is important to specify that the act or omission must involve a case in which a power, ministry, or office requires a certain behavior and that behavior is violated. One example, in relation to the functions especially entrusted to parish priests (cf. c. 530), would be the harm that could be caused by a lack of due diligence in fulfilling them (cf. c. 1741,4° as a penal cause for removal of the priest).

2. *Penalties*

a) For the *malicious* offense of abuse of power or office, the penalty established is a preceptive, indeterminate, *ferendae sententiae* penalty, with express indication of the expiatory penalty of dismissal from office (cf. c. 1336 § 1,2°). This seems obvious for cases where the abuse derives specifically from exercising an office, in the light of c. 1349. Mention of the expiatory penalty of dismissal from office, taking c. 1349 into account, excludes the imposition of censures. In a way, the legislator is indicating the graver penalty that can be imposed in punishing this offense. Nevertheless, in the case of abuse of power or office the aggravating circumstances of c. 1326 § 1,2° cannot be considered since the legislator includes abuse in the description of the offense.

b) For the *culpable* offense, a *ferendae sententiae* penalty is provided, which is also preceptive ("*puniatur*"), but indeterminate ("*iusta poena*"). This is the only *culpable* offense that, as such, is designated in the *CIC* and thus the only case in the code where a penal norm expressly provides the punishment (cf. c. 1321 § 3).

In both offenses, c. 1344 must be taken into account because the penalties are preceptive, as well as c. 1349 because the penalties are indeterminate.

TITULUS IV
De crimine falsi

TITLE IV
The False Accusation

1390 **§ 1. Qui confessarium de delicto, de quo in can. 1387, apud ecclesiasticum Superiorem falso denuntiat, in interdictum latae sententiae incurrit et, si sit clericus, etiam in suspensionem.**

§ 2. Qui aliam ecclesiastico Superiori calumniosam praebet delicti denuntiationem, vel aliter alterius bonam famam laedit, iusta poena, non exclusa censura, puniri potest.

§ 3. Calumniator potest cogi etiam ad congruam satisfactionem praestandam.

§ 1. A person who falsely denounces a confessor of the offence mentioned in Can. 1387 to an ecclesiastical Superior, incurs a *latae sententiae* interdict and, if a cleric, he also incurs a suspension.

§ 2. A person who calumniously denounces an offence to an ecclesiastical Superior, or otherwise injures the good name of another, can be punished with a just penalty, not excluding a censure.

§ 3. The calumniator can also be compelled to make appropriate amends.

SOURCES: § 1: c. 2363
§ 2: c. 2355
§ 3: c. 2355

CROSS REFERENCES: cc. 220, 1332, 1333, 1349, 1387

COMMENTARY

Antonio Calabrese, cp.

The offense of falsely denouncing a confessor of the offense of solicitation (§ 1) and the offenses of calumny or harming the good reputation of another (§ 2) are punished in c. 1390. The common elements required in

these offenses are alteration of the truth, malice, and harm caused to the good reputation of another.

1. *Denunciation against a confessor innocent of the offense of solicitation* "ad turpia" *in confession*

Under c. 1387, a priest who, during or under the pretext of sacramental confession, solicits a penitent to commit a sin against the sixth commandment of the Decalogue commits this offense. Depending on the gravity of the offense, it must be punished with suspension, prohibitions, deprivation, or expulsion from the clerical state.

For a confessor in this case to be punished, the solicited penitent must make the denunciation. However, to denounce a confessor falsely is a grave offense. In *CIC*/1917, a false denunciation was punished with excommunication "latae sententiae speciali modo reservata" to the Apostolic See (c. 2363). Furthermore, it was a reserved sin, the only one reserved "*ratione sui*" to the Holy See (c. 894).

In this context, *to denounce* is to make an accusation of solicitation to the proper authority. This accusation may be made orally, provided an official record is signed afterward by the person making it or, if he is unwilling to sign, by two witnesses who attest that the person making the denunciation did not wish to sign. The accusation may also be written, detailing the elements required to identify the confessor and to constitute the offense, and including the signature and address of the person making the denunciation. If the person is unknown, the signature alone is insufficient for identification, and the letter must be considered anonymous. Anonymous letters do not constitute a denunciation. In an Instruction dated February 20, 1867, the Holy Office ordered that anonymous letters were to be excluded in the case of an offense of solicitation, and the order is still valid. However, anonymous letters may be sufficient reason to initiate a preliminary investigation.

Not only may a real or feigned penitent commit the offense of false denunciation and incur the penalty, but also any other person who makes a false denunciation against a confessor. An example might be another priest who says that he learned of the matter in confession.

The competent ecclesiastical superior to whom the denunciation is to be made must be, according to c. 1341, the ordinary proper, the local ordinary or the quasi-local ordinary of the accused, or the local ordinary where the offense was denounced. The Apostolic See is also to be the competent superior and the CDF in this case (*PB* 52).

Although the Code speaks of denunciation made to an ecclesiastical superior, some believe that it is sufficient for the denunciation to be made to any ecclesiastical superior, even one without jurisdiction to handle the

case, but that opinion appears unfounded. Denunciation to a superior without jurisdiction has no value, but the person making the denunciation could be guilty of the offense of false or calumnious denunciation and be punished with a just penalty or even required to make a retraction of the calumny and repair the harm (c. 1390 §§ 2–3).

A denunciation is false if the confessor has not committed the offense of solicitation *ad turpia*. In addition, it must affect the confessor as a priest who is fulfilling his function as a confessor and who, in the act or upon the occasion or under the pretext of sacramental confession, makes a solicitation. That case is covered in c. 1387, which is a cross-reference for this norm. A priest who solicits *ad turpia* outside of confession is not included in the offense punished in this canon. Outside of confession means not during the act, nor upon the occasion of nor under the pretext of confession, and not in the case where the priest, in the act or upon the occasion of or under the pretext of confession solicits other kinds of offenses.

The essential element of a false denunciation is malice on the part of the person making the denunciation if he is aware that the confessor is innocent and still makes the accusation. The offense is committed even if the accuser does not know that a false denunciation bears a penalty. Although ignorance of the penalty is an attenuating circumstance because it has a liberating effect on *latae sententiae* penalties (cf. c. 1324 § 3 in relation to § 1,9°), an offender does not automatically incur the established penalty; punishment may be inflicted only by sentence or decree, always considering attenuating circumstances.

Anyone who incites another to falsely denounce a confessor out of vengeance, hate, jealousy, or for any other reason does not incur the sanctions of c. 1390, although he commits a grave sin.

The judge and the ordinary should be cautious when admitting denunciations. They may prudently resolve these cases with an adequate preliminary investigation and by keeping in mind the provisions of c. 1942 § 2 of *CIC*/1917: "Denunciations made by an obvious enemy or a vile or unworthy person and anonymous denunciations shall be ignored unless there are such circumstances and other elements as to make the accusation probably true."

For anyone who makes a false denunciation, the penalty provided is *latae sententiae* interdict. If the false accuser is a cleric, he also incurs *latae sententiae* suspension. Since the penalty is neither limited nor determined, then under c. 1334 § 2, the suspension includes any act of power of order or of jurisdiction and the exercise of any rights and functions inherent in the office.

These grave penalties indicate the gravity of the behavior that constitutes this offense.

2. *Calumnious denunciation of an offense*

A denunciation is calumnious when the accused is innocent of the offense attributed to him.

There must be malice on the part of the offender, who must know that the accused is innocent. If there is no malice, there is no offense. If the person making the denunciation has doubts about whether the accused committed the offense and expresses doubts at the time of the denunciation, there is no offense. However, if he has doubts and expresses certainty in the denunciation, he commits an offense and incurs the sanctions provided in this norm. Nor does a person commit an offense who, knowing that the accused is innocent, is later deceived and convinced of the contrary by other persons, and induced to make a denunciation.

The offense must be made to an ecclesiastical superior. This includes the superior of an institute of consecrated life or of a society of apostolic life when their own subjects are concerned. As we indicated a propos of a false denunciation of a solicitation offense, the term superior should be interpreted to mean anyone with jurisdiction to hear the matter, as it appears to be implied in the meaning of the norm. For instance, it makes no sense to denounce a diocesan priest to a religious superior.

The denunciation must be made formally. For any of these matters, it must be made to the superior of jurisdiction. Furthermore, it must be made in writing and signed by the person making the denunciation. If that person refuses to sign, the denunciation must be held as not made, and if the person does not know how to write, there must be a stamped indication with an explanation by the superior. Anonymous denunciations must not be taken into consideration, although upon occasion they can give rise to a tentative preliminary investigation.

By merely making the denunciation, the author of a calumnious denunciation commits an offense and incurs the sanctions provided, regardless of the result, meaning, even if the denunciation produces no effect whatsoever.

Any of the offenses except the one described in § 1 may deal with calumny. However, there must be an offense, a sinful external action that the Code prohibits and provides a penalty for the offender. False denunciation of simple sins that are not considered to be offenses in the Code is also relevant, but they refer to the generic harm to the good reputation of others, which we shall treat next.

3. *Harming another's good reputation*

Nobody may unlawfully harm the good reputation that any person enjoys (c. 220). A good reputation is a person's right.

The ways in which a person's good reputation may be harmed are many and varied: calumny, properly speaking, unlawful revelation of secret facts, occult offenses, secrets of office, etc. Publication may be in any manner: aloud, via the press, using other means of social communication, etc. If the harm to a good reputation is produced by communication to various persons—at least two—it becomes defamation, which, although the Code does not differentiate it from the offense of calumny or harming a good reputation, nevertheless should be taken into consideration by the judge or the ordinary at the time of imposing the penalty.

Harm to another's good reputation may be caused by accusing someone of a particular offense and also, depending upon the condition of the person harmed, by insinuation, suspicion, etc.

Here harm to a good reputation is understood to be grave; that is, it must refer to communicating or divulging facts or offenses that gravely harm another's good reputation. The harm caused may also be greater or lesser depending upon the social importance of the person who is harmed. The judge and the ordinary, when judging the gravity of the harm and determining the resulting penalties, must keep in mind all attenuating and aggravating circumstances.

All the penalties provided are *ferendae sententiae*, left to the discretion of the judge and the ordinary. In addition, they are facultative and indeterminate (cf. c. 1349).

However, the norm specifies that the superior of jurisdiction, the one who imposes the penalty, may also impose a censure: "iusta poena, non exclusa censura puniri potest." The censure is not determinate, but the choice is left up to the superior.

Since excommunication can be imposed or declared only after a judicial trial before a tribunal of at least three judges (c. 1425 § 1,2°), this censure may not be imposed by the ordinary in a decree after an administrative procedure.

Although a censure is the maximum penalty, the norm does not exclude imposing it in cases of particularly grave calumny or harm to another's good reputation. Since a censure is a medicinal penalty that must be absolved when contumacy ceases (c. 1358), there seems to be a requirement that the offender first repair the damaged reputation; this means that in these cases contumacy is to be understood as persistency by the accuser in calumny or in harming a good reputation, and also an absence of retraction.

However, if the offender is a cleric, the judge and the ordinary may impose suspension, a censure that is not as grave as excommunication and that may also be imposed by decree after an administrative procedure. In addition, for both clerics and laypersons, interdict may also be imposed.

4. *Obligation to give due satisfaction*

The false accuser or calumniator and anyone who in any other way harms another's good name may also be required to give adequate satisfaction (§ 3). There can be no satisfaction if there is no retraction of the calumny first. If the damaging facts are true but have remained up until that time secret or occult, the defamer cannot retract; but even in that case he must still make just reparation for the harm caused. Such reparation is required by natural law.

In the internal forum of the sacraments, according to the principles of moral theology, calumniators or anyone who has harmed the good reputation of another may not be absolved without first repairing the harm caused or at least promising to repair it. However, this norm leaves the imposition of reparation up to the free decision of the judge or the ordinary. On the other hand, retracting a false denunciation is required in all cases, even if no obligation to make satisfaction is imposed.

1391 **Iusta poena pro delicti gravitate puniri potest:**

1° qui ecclesiasticum documentum publicum falsum conficit, vel verum mutat, destruit, occultat, vel falso vel mutato utitur;

2° qui alio falso vel mutato documento utitur in re ecclesiastica;

3° qui in publico ecclesiastico documento falsum asserit.

The following can be punished with a just penalty, according to the gravity of the offence:

1° a person who composes a false public ecclesiastical document, or who changes or conceals a genuine one, or who uses a false or altered one;

2° a person who in an ecclesiastical matter uses some other false or altered document;

3° a person who, in a public ecclesiastical document, asserts something false.

SOURCES: cc. 2360, 2362

CROSS REFERENCES: cc. 1343, 1349, 1540

COMMENTARY

Antonio Calabrese, cp.

1. *Preliminary concepts*

Ecclesiastical documents include the following types:

— lawfully issued public documents or statements made by a public ecclesiastical person exercising the functions of office. The documents or statements refer to acts of ecclesiastical governance and may be legislative, judicial or executive;

— private documents, which are all others (c. 1540 §§ 1 and 3).

Documents kept in the archives of the Roman Curia, dioceses and parishes may be either public or private.

Civil public documents are documents so classified according to local civil law.

Historically, there has been a divergence of opinion regarding the concept of *public person*. Some authors have included only notaries in the concept of public person, while others have included anyone in any ministry who documents official acts. According to present-day doctrine, an ecclesiastical public person with the power to draw up a public document is any person authorized by law to do so as part or consequence of his ecclesiastical function. Therefore, a notary is not the only type of ecclesiastical public person; a parish priest who issues a birth or marriage certificate can also be a public person. Nevertheless, in the matter of documents, a notary continues to be the public person par excellence.

2. *The offenses*

This canon punishes the offense of *material or ideological falsification*. In the norm, there are up to seven types, grouped in two series. The first group refers to a) ecclesiastical public documents (nos. 1° and 3°), and the second b) treats private ecclesiastical documents and public and private civil documents (no. 2°).

a) The first group of offenses (nos. 1° and 3°) includes six types:

— *Fabrication or compilation of a false public ecclesiastical document*. This may be a document drawn up by a public or a private person. In this case, as in the others, the offense is graver when it is committed by a public person or a person in a position of dignity, or if the offender abuses his authority or office (cf. c. 1326 § 1,2°).

A document is false if its content is not substantially true, regardless of whether a public person draws it up. A document attesting to a fact or an act that never happened is false, but a document in which the signer adds to the true content any untrue content that is marginal and does not affect the substance cannot be called false. Nevertheless, there are some circumstances that may affect the substance of the matter, such as when the date is changed or the document is attributed to someone else.

— *Alteration of an authentic public ecclesiastical document*. Alteration is substantial if the document no longer proves what it was supposed to prove. This may happen with a simple change of date.

— *Destruction of a true or authentic ecclesiastical document*. Destruction may consist in the elimination of a document or in the obliteration of the writing so that it can no longer be read or reproduced in any way.

— *Hiding of a public ecclesiastical document*. This occurs when a document is hidden so that those to whom it is addressed or who have an interest in it cannot find it. If it is permanently hidden, that is the equivalent of destroying it, and the offense is graver. If it is temporarily hidden, but precisely at the time when the document was needed as evidence,

there is also an offense, even if afterwards the document is returned to its place and available to any authorized or interested person. If temporary occultation occurs at a time when no one needs the document, there is no offense, since the action causes no harm.

— *Use of a falsified or altered public ecclesiastical document.* The concepts of falsification and alteration have been explained above (a and b). Use is an offense if the false or altered document serves to carry out a gravely unlawful act or to omit unlawfully a required act, with harm to others. It is assumed that the falsification or alteration is made by another party, since if the same party who uses it makes it, there is only one offense, aggravated unlawful use.

— *Ideological falsehood in a public ecclesiastical document.* This occurs when something is written in the document that is false. If the author is the person who is using the document, there is only one offense, unlawful use. If the author is another person, there are two offenses, ideological falsification and unlawful use. This is the only offense that refers to ideological falsification; all the others refer to material falsification.

b) The second series (n. 2°) includes using a false or altered private ecclesiastical document or a public or private civil document in ecclesiastical matters. This type of offense is distinguished from other types because it does not refer to a public ecclesiastical document, but to other documents, ecclesiastical or not.

A false document is described above (a). As for an altered or modified document, alteration or modification is substantial if, because of it, the document serves to prove what it did not before prove, or it ceases to prove what it previously did. Marginal modification that leaves the substance of the document intact is not an offense.

Ecclesiastical matters are those that relate to the Church, its purpose, works, institutions, and goods. The use of modified or falsified private ecclesiastical documents or public or private civil documents is an offense under this canon if the modifications are made to ecclesiastical matters, but not if made to civil matters. It is also not a canonical offense to use false or altered public ecclesiastical documents in civil matters, but previous falsification or use is an offense. Punishment of such behavior in civil matters is not treated by the Code, which leaves it to the civil law.

3. *The penalties*

For all cases, the penalty provided is facultative and indeterminate (cf. cc. 1343 and 1349).

TITULUS V
De delictis contra speciales obligationes

TITLE V
Offences Against Special Obligations

1392 **Clerici vel religiosi mercaturam vel negotiationem contra canonum praescripta exercentes pro delicti gravitate puniantur.**

Clerics or religious who engage in trading or business contrary to the provisions of the canons, are to be punished according to the gravity of the offence.

SOURCES: c. 2380; SCCouncil Decr. *Catholica Ecclesia*, 29 iun. 1950 (*AAS* 42 [1950] 601–602)

CROSS REFERENCES: cc. 286, 672, 1314, 1315 § 2, 1344, 1349

COMMENTARY

Giuseppe Di Mattia, ofm. conv.

1. The heading of title V, which treats offenses committed by clerics and religious in cc. 1392 and 1394–96, corresponds to title XVII of book V (cc. 2376–2389) of the old Code, but the old heading specified that it concerned offenses proper to the clerical and religious state. Although the title is now general, except for c. 1393, the offenses covered remain applicable only to those persons. At least theoretically, c. 1393 is applicable to any member of the faithful; for that reason, it would more logically be placed at the beginning or end of the heading.

There has been a significant reduction in the types of offenses. The fourteen in *CIC*/1917, with a detailed description of the circumstances and characteristics of each, are now barely four—with c. 1393 added to them—in the current *CIC*, offenses that are outdated have been eliminated; only

the ones that are still relevant in contemporary ecclesial and civil life have been retained.

2. The offense designated in c. 1392 arises from cc. 286 and 672, which prohibit clerics and religious from engaging in trade or business. While c. 142 of *CIC*/1917 absolutely prohibited trade or business, it may now be practiced with due caution and the permission of the lawful ecclesiastical authority. This includes local ordinaries and major superiors, depending upon the norms of the applicable constitutions. To their wisdom and prudence is left the assessment of whether authorization should be granted, but they must first set forth strict precautionary measures. In this matter, it is important to be aware of no. 17 of *Presbyterorum ordinis* (*PO*).

The canon prohibits any type of commercial, industrial, business, stock market, or speculative activities when they are principally for profit. The penalty provided is preceptive, indeterminate and *ferendae sententiae*. In *quantitas* and *qualitas*, the penalty should be determined in accordance with the gravity of the offense.

1393 Qui obligationes sibi ex poena impositas violat, iusta poena puniri potest.

A person who violates obligations imposed by a penalty can be punished with a just penalty.

SOURCES: —

CROSS REFERENCES: cc. 1314, 1315 § 2, 1343, 1349

COMMENTARY

Giuseppe Di Mattia, ofm. conv.

To an offense that has been committed and punished—defined by John Paul II as "anti-ecclesial, offensive and scandalous behavior of members of the people of God"[1]—a new offense has now been added. It is based on the same type of behavior, with the added gravity of being evidence of a rebellious attitude towards the prior penal sanction. Such behavior is penalized for the purpose of achieving restitution of ecclesial communion and the reform of the offender.

That is the type of case covered in this canon, for which there is no equivalent in the old code. The rationale behind its introduction cannot be deduced from the drafting process. The term *alia* that was in the original formulation of c. 67 of the 1973 *Schema* (*"justa alia poena puniri potest"*) was considered superfluous.[2] It was removed by c. 1345 of the 1980 *Schema*.

Contrary to what happens in civil law systems, the canonical system excludes the forced execution of a penalty. That is why this norm is opportune from the point of view of a member of the faithful who sincerely tries to recover and live again in a relationship of *communio* with his brothers in faith.

The penalty is *ferendae sententiae*, facultative and indeterminate. The connotation of "just" in the norm alludes to the degree with respect to the circumstances of the case.

1. JOHN PAUL II, *Discurso al Tribunal de la S. R. Romana*, 1979, in *AAS* 71 (1979), p. 425.
2. *Comm.* 9 (1977), p. 315.

1394 **§ 1. Firmo praescripto can. 194 § 1, no. 3, clericus matrimonium, etiam civiliter tantum, attentans, in suspensionem latae sententiae incurrit; quod si monitus non resipuerit et scandalum dare perrexerit, gradatim privationibus ac vel etiam dimissione e statu clericali puniri potest.**

§ 2. Religiosus a votis perpetuis, qui non sit clericus, matrimonium etiam civiliter tantum attentans, in interdictum latae sententiae incurrit, firmo praescripto can. 694.

§ 1. Without prejudice to the provisions of Can. 194 § 1 no. 3, a cleric who attempts marriage, even if only civilly, incurs a *latae sententiae* suspension. If, after warning, he has not reformed and continues to give scandal, he can be progressively punished by deprivations, or even by dismissal from the clerical state.

§ 2. Without prejudice to the provisions of Can. 694, a religious in perpetual vows who is not a cleric but who attempts marriage, even if only civilly, incurs a *latae sententiae* interdict.

SOURCES: § 1: c. 2388; *SAP* Decr. *Lex sacri coelibatus*, 18 apr. 1936 (*AAS* 28 [1936] 42–43); *SAP* Decl., 4 maii 1937 (*AAS* 29 [1937] 283–284)
§ 2: c. 2388

CROSS REFERENCES: cc. 194 § 1, 277, 694, 1087–1088, 1314, 1332–1334, 1336

COMMENTARY

Giuseppe Di Mattia, ofm. conv.

1. Although the provisions of this canon are centuries old and were included in *CIC*/1917 (c. 132 § 1, reinforced by c. 2388), the controversy about the law of clerical celibacy in the Latin Church makes the canon a current issue. In § 1, a cleric who attempts marriage gravely breaks the law of celibacy that he promised to follow. Canon 132 § 1 *CIC*/1917 included the statement that "peccantes sacrilegii quoque rei sunt." This contrasts with current c. 277, which eliminates any direct reference to sin.

Because of the expression "etiam civiliter tantum," it is understood that marriage may be *attempted* under civil law and/or under canon law. Therefore, for the offense to be consummated, the ceremony must include

a manifestation of consent. Consent is valid insofar as it is given before a civil authority; it is invalid if given canonically, because of the decisive impediment of c. 1087. On the other hand, if for any reason the consent is invalid (for example, by mistake), it is a case of concubinage, which is covered in the next canon.

The penalty provided is *latae sententiae* suspension: a medicinal penalty or a censure (cf. cc. 1333–1334). To that must be added removal *ipso iure* from ecclesiastical office, under the provisions of c. 194 § 1,3°.

The superior with jurisdiction should admonish the offending cleric so that he may distance himself from the situation. Pastoral care and the law make available several types of initiatives for that purpose (cf. cc. 1339–1341). From the juridic point of view, what is desired is *recessio a contumacia,* in the sense of c. 1347 § 2, in relation to c. 1358. If that pastoral effort bears no fruit and the scandal continues, the authority of jurisdiction should intervene gradually (*gradatim,* says the canon), and add to the penalty incurred a new one, which may extend from pertinent deprivation to dismissal from the clerical state.

2. Naturally, legislation is the same for religious clerics as for secular clerics. If religious in perpetual vows who are not clerics attempt marriage, even if only civilly, they are subject to the *latae sententiae* penalty of interdict, a censure regulated by c. 1332. The penalty is without prejudice to the provisions of c. 694 § 1,2°, that is, dismissal *ipso iure* from the institute. The major superior must certify and declare the dismissal for it to be juridically valid.

3. In both cases, the word *attempt* marriage is used because canon law considers the act as a conscious and voluntary *attempt.* It has no juridical value, since a canonical marriage is totally null because of the impediment "*ex ordine sacro*" or "*ex voto publico*" (cf. cc. 1087–1088).

Comparing the current norm with the norm in *CIC*/1917, the current norm is less severe, more understanding of human values, and laden with pastoral care. An example is its silence on the partner, an accomplice in the attempted marriage, and the elimination of the consequent penalty (cf. 2388 *CIC*/1917), always excepting application of the general norm on accomplices in offenses under c. 1329. This is especially so when the partner has consented *ex dolo* to celebrating the attempted marriage (cf. c. 1321 § 1). It is possible that one party may in good faith be unaware of the state of the other, who has kept silent about it or concealed it.

Those cases notwithstanding, this norm raises a number of problems that require in-depth treatment:

— For a religious who is a cleric, is dismissal from the institute automatic? If so, how can his state as a cleric *acephalus seu vagus,* which is inadmissible according to c. 265, be reconciled until an indulgent bishop is found?

— For a religious who is not a cleric, there is no mention of possible intervention by an authority through admonishment, nor of the possibility of *recessio a contumacia*. If that happens, should the reformed offender be readmitted to the institute?

As established in the canon, the penalty appears to be absolute and perpetual. In the process of the drafting *iter*, there was some wavering, but the tendency was towards a stronger penalty or greater aggravation. For example, c. 69 § 2 of the 1973 *Schema* provided only facultative penalties. The paragraph was eliminated in c. 1346 of the 1980 *Schema* and was reintroduced in the 1981 *Relatio* with the preceptive determinate penalty of *latae sententiae* interdict. Thus, it passed into the 1982 *Schema novissimum* and into the current version. Published reports offer no clues to show the development of the drafting *iter*.[1]

1. Cf. *Comm*. 9 (1977), p. 316.

1395 **§ 1. Clericus concubinarius, praeter casum de quo in can. 1394, et clericus in alio peccato externo contra sextum Decalogi praeceptum cum scandalo permanens, suspensione puniantur, cui persistente post monitionem delicto, aliae poenae gradatim addi possunt usque ad dimissionem e statu clericali.**

§ 2. Clericus qui aliter contra sextum Decalogi praeceptum deliquerit, si quidem delictum vi vel minis vel publice vel cum minore infra aetatem sedecim annorum patratum sit, iustis poenis puniatur, non exclusa, si casus ferat, dimissione e statu clericali.

§ 1. A cleric living in concubinage, other than in the case mentioned in Can. 1394, and a cleric who continues in some other external sin against the sixth commandment of the Decalogue which causes scandal, is to be punished with suspension. To this, other penalties can be progressively added if after a warning he persists in the offence, until eventually he can be dismissed from the clerical state.

§ 2. A cleric who has offended in other ways against the sixth commandment of the Decalogue, if the offence was committed by force, or by threats, or in public, or with a minor under the age of sixteen years, is to be punished with just penalties, not excluding dismissal from the clerical state if the case so warrants.

SOURCES: § 1: c. 2359 §§ 1 et 3
§ 2: c. 2359 § 2

CROSS REFERENCES: cc. 695 § 1, 1314, 1344, 1349, 1336 § 1,5°

COMMENTARY

Giuseppe Di Mattia, ofm. conv.

1. A life of consecration is a testimony, insofar as the faithful "are a splendid sign in the Church as they foretell the heavenly glory" of the Kingdom of God. Thus, c. 573 exalts the incomparable gift of persons who, welcoming the call from the Divine Master, follow him intimately to live in obedience, with nothing of their own, and in chastity. The legislator is particularly sensitive when considering the most vulnerable evangelical counsel, the virtue of chastity, which is "the pearl of Catholic priesthood."

2. In § 1 of c. 1395, the legislator addresses acts against the sixth commandment of the Decalogue, mentioning concubinage explicitly. These acts are not isolated or occasional sins; for example, concubinage is

defined as a stable sexual relationship with a person of the opposite sex. The other element constituting the offense is the scandal that may occur in the environment or place where the act is committed, since it may result in moral harm to the faithful who are aware of the situation. Finally, for the offense to occur, the canon requires the act to be external.

The penalty prescribed, preceded by a prescribed admonishment (cf. c. 1347), is preceptive *ferendae sententiae* suspension. If there is obstinacy in the offense, after suspension, other penalties may be added at the discretion of the superior, including dismissal from the clerical state. Religious are also included in this precept by virtue of c. 695 § 1, which contains an express reference to c. 1395.

3. *Aggravating* circumstances that are a part of the consummation of the offense must be kept in mind in this type of case. Such circumstances may include violence, public scandal and abuse of minors under 16 years of age. The range of possible aggravating circumstances is the reason the legislator has not established a determinate penalty. He merely establishes that a just penalty should be imposed; however, he does not exclude dismissal from the clerical state if the seriousness of the offense so requires.

1396 Qui graviter violat residentiae obligationem cui ratione ecclesiastici officii tenetur, iusta poena puniatur, non exclusa, post monitionem, officii privatione.

A person who gravely violates the obligations of residence to which he is bound by reason of an ecclesiastical office, is to be punished with a just penalty, not excluding, after a warning, deprivation of the office.

SOURCES: c. 2381; SCCouncil Resol., 10 iul. 1920 (*AAS* 12 [1920] 357); SCCouncil Resp., 23 apr. 1927 (*AAS* 19 [1927] 415)

CROSS REFERENCES: cc. 1344, 1349

COMMENTARY

Giuseppe Di Mattia, ofm. conv.

To understand the importance of this canon, it is essential to keep in mind the distinction between residential offices, which require officeholders to reside in their territory, and non-residential offices.

Offices the Code describes as residential are bishop (cc. 395 § 1, 410), diocesan administrator (c. 429), parish priest and priests with the care of souls *in solidum* (cc. 533 § 1, 543 § 1), and assistant parish priest (c. 550 § 1). However, the Code does not apply the obligation of residence to diocesan priests who do not have a residential office in the diocese. Moreover, c. 283 § 1 describes physical presence and residence in the diocese more as a moral duty than a juridical one. Furthermore, the wording is negative and is more exhortative than imperative.

In interpreting the canon, it is necessary to understand how the term *graviter* is used. To evaluate the gravity of the offense, the frequency and duration of absence must be taken into account. Moreover, it is important to consider the repercussion of the absence on the officeholder's ability to meet the duties of his office, as well as the spiritual and organizational harm that may result for the ecclesial community.

From a strictly formal point of view, what is relevant is physical presence; consequently, what is penally actionable is physical absence. Moral and operative absences are regulated by legislation enacted for that purpose.

The penalty established by this canon is preceptive and indeterminate. It should be a just penalty in proportion to the gravity of the offense. For extreme cases, after the preceptive admonishment, dismissal from

office is not excluded. For any possible procedural warning about the penalty, it is fundamental to determine the channel that is best for the case (judicial or administrative), and to follow the pertinent norms: cc.1341–1342 for substantive law and cc. 1717–1728 for procedural law.

This norm was not included in the 1973 *Schema*, although it appeared in *CIC*/1917 (c. 2381). It unexpectedly reappeared in c. 1348 of the 1980 *Schema*—there is no explanatory note in any published reports—so it remained and was published in the current text.

TITULUS VI
De delictis contra hominis vitam et libertatem

TITLE VI
Offenses Against Human Life and Liberty

1397 **Qui homicidium patrat, vel hominem vi aut fraude rapit vel detinet vel mutilat vel graviter vulnerat, privationibus et prohibitionibus, de quibus in can. 1336, pro delicti gravitate puniatur; homicidium autem in personas de quibus in can. 1370, poenis ibi statutis punitur.**

One who commits homicide, or who by force or by fraud abducts, imprisons, mutilates or gravely wounds a person, is to be punished, according to the gravity of the offence, with the deprivations and prohibitions mentioned in Can. 1336. In the case of the homicide of one of those persons mentioned in Can. 1370, the offender is punished with the penalties there prescribed.

SOURCES: cc. 2343 § 1, 2354; SCHO Decr. *Cum ex expresso*, 21 iul. 1934 (*AAS* 26 [1934] 550)

CROSS REFERENCES: cc. 695, 729, 746, 1041,4°–5°, 1044 § 1,3°, 1047 § 2,2°, 1089, 1090, 1314, 1341–1343, 1344, 1370

COMMENTARY

Francisca Pérez-Madrid

1. *Introduction*

There are two canons under the heading "Offenses Against Human Life and Liberty"—this one and c. 1398, which refers to abortion. In comparison with the provisions of cc. 2353 and 2354 of *CIC*/1917 included under title XIV ("Offenses Against Life, Liberty, Property, Reputation and Morals"), the current regulation has been considerably simplified. First,

with respect to offenses against human life, the categories of duel (c. 2351 *CIC*/1917) and suicide have been eliminated (c. 2350 § 2 *CIC*/1917). Second, regarding offenses against liberty, those referring to coercion to enter a religion (c. 2352 *CIC*/1917)[1] and the sale of a human as a slave (c. 2354 *CIC*/1917) also have been eliminated. There is no longer a distinction between clerics and laypersons when determining the penalty that can be imposed for committing these acts.

It is of great interest to include here a response from the *Coetus de re poenali* that explains and justifies this example of the drastic reduction in types of offenses made in the special part of penal law: "talia delicta recenseri non posse in iure poenali canonico, sive quia iam damnantur et puniuntur a iure civili, sive quia in Ecclesia caret mediis pro apta inquisitione."[2]

In spite of those reasons, however, and keeping in mind that the offenses in this canon are generally included in civil penal law, the legislator has preserved the classification of offenses in c. 1397. In this way, the grave attack on life, liberty and human dignity that such acts imply is strongly emphasized.

The *Catechism of the Catholic Church* has made explicit statements on the moral gravity of the acts covered by this canon. With respect to *direct and willful homicide,* the text reads: "The murderer and those who cooperate voluntarily in murder commit a sin that cries out to heaven for vengeance (cf. Gn 4:10)" (CCC 2268). "Infanticide (cf. *GS* 51, 3), fratricide, parricide, and the murder of a spouse are especially grave crimes by reason of the natural bonds which they break" (CCC 2268). "Kidnapping and hostage taking bring on a reign of terror; by means of threats they subject their victims to intolerable pressures. They are morally wrong. Terrorism, which threatens, wounds, and kills indiscriminately, is gravely against justice and charity. Torture which uses physical or moral violence to extract confessions, punish the guilty, frighten opponents, or satisfy hatred is contrary to respect for the person and for human dignity. Except when performed for strictly therapeutic medical reasons, directly intended amputations, mutilations, and sterilizations performed on innocent persons are against the moral law (cf. Dz.-Sch. 3722)" (CCC 2297).

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1. Even though not currently a supposition of delict, admission to a religious institute, a secular institute, or a society of apostolic life becomes invalid in as much as violence, grave fear, or deceit has been a factor (c. 643 § 1,4°, c. 721, together with c. 125, and c. 735 § 1, respectively).
2. *Comm.* 9 (1977), p. 318.

2. *Types*

If "type" refers to the set of specific elements by which one offense is distinguished from others, then the following the types of offenses are covered by c. 1397: murder, abduction, kidnapping, mutilation, and inflicting grave wounds or injury.[3]

a) "*Qui homicidium patrat...*" *Homicide* has been defined as "violenta (non naturalis) occisio, ademptio vitae, exanimatio hominis vivi... ab homine (non a bruto vel a fulmine) facta."[4] Included in the concept are parricide, assassination, and infanticide. If the passive subject is any of the persons covered in c. 1370 (Roman Pontiff, bishop, cleric, or religious), the legislator remits to the penalties of that canon. Concerning marriage, the impediment of crime, regulated by c. 1090, must be taken into account.

b) "*Vel hominem vi aut fraude rapit...*" Kidnapping and abduction can only be malicious, regardless of the purpose for which they are committed. In *CIC*/1917, c. 2353 regulated this offense in a different canon from other attempts against human life and liberty. According to a literal reading of that canon, anyone committed this offense who, with the intention to marry or commit a lecherous action, kidnapped a woman against her will with violence or malice, or an underage woman who consented, or if her parents or tutors did not know it and were opposed. On the other hand, simply holding a woman did not constitute an offense, although it was an impediment to marriage[5] (c. 1074 § 1 and 3 *CIC*/1917). In *CIC*, the concept of abduction has been broadened in the penal area, resulting in a similar broadening in the objective element of the offense. The sex of the kidnapped person is irrelevant, except with respect to being an impediment to marriage, where the person kidnapped must be a woman (cf. c. 1089).

c) "*Vel detinet...*" The language of the canon means that holding a person for any reason (*kidnapping*) is distinguished from *abduction*, which is an action for the purpose of marriage or for a libidinous kind of purpose.[6] In comparison with *CIC*/1917, the legislator has broadened the protection of liberty, regardless of the purpose pursued by the offender.

d) "*Vel mutilat...*" Mutilation of a person is a grave injury, no matter which part of the body is affected. Mutilation may be classified as "serious" not only because of the external effect but due to the motive, such as in the case of sterilization.

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3. Cf. among others, F. NIGRO, "Libro VI: Le sanzioni nella Chiesa," in P.V. PINTO (Ed.), *Commento al Codice di Diritto Canonico* (Rome 1985), pp. 749–824.

4. WERNZ-VIDAL, *Ius Canonicum*, t. VII, *Ius poenale ecclesiasticum* (Rome 1937), p. 510.

5. T. GARCÍA BARBERENA, commentary on c. 2353, in *Comentarios al Código de Derecho canónico*, t. IV (Madrid 1964).

6. Cf. A. CALABRESE, *Diritto penale canonico* (Milan 1990), p. 287.

e) "*Vel graviter vulnerat*..." It is difficult to establish a delineation between injuries that are grave and those that are not. A canonical judge has the discretion to determine whether the act falls into the category of offense.

3. *Penalties*

The penalties for the offenses described in this canon are deprivation and the prohibitions established in c. 1336. They are *ferendae sententiae*, expiatory (see c. 1314 and commentary), and preceptive ("*puniatur*", see c. 1344 and commentary).

These are penalties of less gravity than the *latae sententiae* excommunication provided for the offense of abortion (c. 1398). The difference is probably due to the legislator's interpretation that these offenses are sufficiently punished under civil laws. However, that is not the case at present for abortion (see commentary on c. 1398). For that reason, for those offenses, c. 1344,2° must be kept in mind. It gives the judge the faculty to abstain from imposing a penalty if the offender has been adequately punished by civil authorities or it is expected that he will be.

There is no a priori gradation of the penalty that may be imposed for murder, mutilation, kidnapping, or causing injury; the canon states, "pro delicti gravitate puniatur." The legislator is aware that those offenses are adequately punished by civil laws; therefore, it is unnecessary to sanction these matters with new and more precise penal norms. Moreover, since they are *ferendae sententiae* penalties, the judge or superior is permitted (cf. cc. 1341–1344), if applicable, to exercise such reasonable gradation.

The remission made to c. 1370 means that if the offense of murder was committed against the Roman Pontiff, anyone with the episcopal character, or against a cleric or religious out of contempt for the faith, the Church, ecclesiastical power, or ministry, that canon must be consulted to determine the penalty (see c. 1370 and commentary). In relation to a member of a religious or secular institute or a society of apostolic life, a special penalty is established when they are guilty of any of the offenses in c. 1397: dismissal from the institute (cf. cc. 695 § 1, 729, 746).

The remission to c. 1370 is only for murder. However, c. 1370 appears to describe a *type* of offense that can be extended to other kinds of physical aggression, such as mutilation, grave injury, and violence in general ("who uses physical force"), not to murder alone. In the face of the internal inconsistency between the canons cited, harmonization seems to be required.

1398 Qui abortum procurat, effectu secuto, in excommunicationem latae sententiae incurrit.

A person who actually procures an abortion incurs a *latae sententiae* excommunication.

SOURCES: c. 2350 § 1; PIUS PP. XII, Alloc., 21 maii 1948; PIUS PP. XII, Alloc., 27 nov. 1951; *GS* 27, 51; PAULUS PP. VI, Alloc., 9 dec. 1972 (*AAS* 64 [1972] 776–779); SCDF Decl., 18 nov. 1974 (*AAS* 66 [1974] 730–747); PAULUS PP. VI, Alloc., 23 apr. 1977 (*AAS* 69 [1977] 281–283)

CROSS REFERENCES: cc. 695 § 1, 746, 1041,4°, 1044 § 1,3°, 1047 § 2,2°, 1314, 1329, 1331

COMMENTARY

Francisca Pérez-Madrid

1. *Introduction*

The norm in this canon is directed towards protecting the life of an unborn child. Its content is not substantially different from c. 2350 of *CIC*/1917. The canon does not define abortion, and the penalty is *latae sententiae* excommunication, although in the previous Code it was reserved to the ordinary. Even before *CIC*/1917, texts can be found that punish abortion. For example, in some Decretals (for example, *X* V 12, 5; *X* V 12, 20), and in later pronouncements from the Roman Pontiffs,[1] abortion was an offense.

The *Catechism of the Catholic Church* has tried to indicate the moral and juridical dimension of this act: "Human life should be totally respected and protected from the moment of conception. From the first moment of his existence, a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life" (CCC 2270). "Since the first century," it later adds, "the Church has affirmed the moral evil of every procured abortion" (CCC 2271). Finally, "Formal cooperation in an abortion constitutes a grave offense. The Church attaches the canonical penalty of excommunication to this crime against human life … The Church does not thereby intend to restrict the scope of mercy. Rather, she makes clear the gravity of the crime committed, the irreparable harm done to the innocent who is put to death, as well

1. SIXTUS V, Const. *Effraenatam*, October 29, 1588, in P. GASPARRI-I. SEREDI, *Codex Iuris Canonici Fontes*, vol I, no. 165, pp. 308–311; GREGORY XIV, Const. *Sedes Apostolica*, May 31, 1591, §1, 2, in ibid., vol. I, p. 330; PIUS IX, Const. *Apostolicae Sedis*, October 12, 1869, § III, no. 2, in ibid., vol. III, pp. 24–31.

as to the parents and the whole of society" (CCC 2272).[2] The offense of abortion is one of the few very grave cases that are punished in the *CIC* with *latae sententiae* excommunication.[3]

2. *Type*

The act referred to in this canon is a consummated abortion, since it is specified that "qui abortum procurat *effectu secuto*" incurs the penalty. Although a frustrated or attempted offense may occur (cf. c. 1328), such acts are not punishable under the offense of abortion. It must be certain that an abortion has been committed and that there is a causal relationship between the act of abortion and the result.

With respect to the subjective element, one can speak only of committing the act with malice. That can be deduced from the verb used (*procurat*), which implies that the act has been committed *studiose et ex industria*, and by the *latae sententiae* penalty, which can be incurred only in the case of "outstanding and malicious offenses" as established by c. 1318. Therefore, if an act is committed because of the omission of due diligence (c. 1321 § 2), it cannot be punished. Cases of preterintentional, spontaneous, or indirect abortion are not punishable. *Procuring an abortion* means effectively to perform or cooperate in the act. Cooperation may be as author or co-author of the offense. According to c. 1329, it includes cooperation by all members of the faithful who, with the same criminal intent, participate in committing the offense, or if without their physical or moral assistance, the offense could not have been consummated; that is the case of accomplices (see commentary on c. 1329).

3. *Canonical concept of abortion*

Doctrine used to understand abortion as expulsion of an unviable living fetus from the mother's womb, causing death of the fetus.[4] Craniotomy, embryotomy, and other operations directly intended to kill the fetus in the mother's uterus were not considered abortion, but homicide. However,

2. Cf. CDF, *Instructio de observantia erga vitam humanam nascentem deque procreationis dignitate tuenda*, (*Donum vitae*), February 22, 1987, *AAS* 80 (1988), p. 79.

3. Cf. *Comm* 2 (1969), p. 85.

4. D. PRUMMER, *Manuale Theologiae Moralis*, t. II, (Barcelona-Freiburg-Rome 1958), pp. 125–128; T. GARCÍA BARBERENA, commentary on c. 2350, §1, in *Comentarios al Código de Derecho canónico*, vol. IV (Madrid 1964), pp. 510–511; AUGUSTINE, *A commentary on the New Code of Canon Law*, vol. VIII (St. Louis-London 1922), pp. 398–399; A. BLAT, *Commentarium Textus Codici Iuris Canonici*, *Liber* V (Rome 1924), p. 249; G. COCCHI, *Commentarium in Codicem Iuris Canonici*, *Liber* V, (Turin 1928), p. 303; A. CANCE- M. ARQUER, *El Código de Derecho canónico*, t. II (Barcelona 1934), p. 500; A. VERMEERSCH-J. CREUSEN, *Epitome Iuris Canonici*, vol. III (Rome 1946), p. 345.

even under the *CIC*/1917, one sector of doctrine was partially opposed to those exclusions. They emphasized that greater malice is required in such cases than when allowing death after extraction of the fetus. They also pointed out that those practices have the elements of the offense of abortion.[5] Other authors have expressed similar opinions in reference to the current regulation.[6]

However, the legislator did not give an explicit definition of abortion in the new Code. The reform commission justified this decision as follows: "Nonnulli petierunt ut detur definitio aborti; Consultores non vident rationem huius definitionis, cum doctrina catholica sit clara hac in re."[7] In reality, Catholic doctrine is clear on the matter, but the *juridical-canonical* concept of abortion was not as clear. Two principal doubts constantly appeared in the doctrine. The first regards the juridical classification of acts directed towards killing the fetus in the uterus—now the majority of cases—can they be called abortions? Second, is viability still the delimiting criterion between homicide and abortion?

When penal law speaks of "abortion," what does it mean? Every offense in canon law implies moral unlawfulness, and this is no exception. Nevertheless, the transition from moral to juridical-penal is not automatic; not all sins are offenses nor do all sins that are offenses operate within the same boundaries. The transition is made by the penal norm when it describes the elements that must be present before a given behavior can be an *offense*. In addition, under c. 18, only a strict interpretation is permitted. It is obvious that nothing said here is intended to raise the question of the *moral* lawfulness of abortion. The question is sufficiently clear in the constant teaching of the Church. What we are trying to do is to deduce from the current legislation when abortion can be said to be an offense.

Uncertainty about the *penal* concept of abortion made it necessary for the ecclesiastical authority to intervene and give an authentic definition. The gravity of the automatic penalty provided for this offense and the doubtful cases as to whether they are abortions or not were the reasons the question was raised before the CPI, in the following terms: "Utrum abortus, de quo in can. 1398, intellegatur tantum de eiectione fetus inmaturi, an etiam de eiusdem fetus occisione quocumque modo et quocumque tempore a momento conceptionis procuretur." The commission's reply was *Negative ad primam partem: affirmative ad secundam.*[8]

5. M. CONTE A CORONATA, *Institutiones iuris canonici ad usum utriusque cleri et scholarum*, 4: *De delictis et poenis* (Turin 1935), pp. 460–461; X. WERNZ-P. VIDAL, *Ius Canonicum*, VII: *Ius poenale ecclesiasticum* (Rome 1937), p. 517; L. CICCONE, "Il confessore e l'aborto," in *Palestra del Clero* 60 (1979), pp. 887–889.

6. L. CICCONE, *Non uccidere. Questioni di morale della vita fisica* (Milan 1984), pp. 145–148; V. DE PAOLIS, *De sanctionibus in Ecclesia. Adnotationes in Codicem: Liber VI* (Rome 1986), p. 119.

7. *Comm.* 9 (1977), p. 317.

8. *AAS* 80 (1988), pp. 1818–1819.

That response finally resolved the first problem that doctrine had been discussing *occidere quocumque modo et quocumque tempore*. The result is that it does not matter whether the fetus is killed in the mother's belly or if it is expelled alive and dies consequently because it is not viable from the moment of conception.

However, with respect to whether viability is a limiting factor, when the response refers to death of the *eiusdem fetus* in the consultation, doubt arises as to whether fetal immaturity was adopted by the legislator as a criterion for distinguishing between abortion and homicide. In other words, does the expression *eiusdem fetus* refer to *fetus inmaturi*[9] or only to *fetus*[10]? When *quocumque tempore* is used, from the context it is more consistent to interpret that the legislator wished to include the time from conception to birth, whether or not the *nasciturus* is viable.

A final question concerns the destruction of embryos fertilized *in vitro*. Can the destruction of embryos fertilized *in vitro* be included in the offense of abortion under c. 1398? There is no unanimity in doctrine on this point. The response does not offer sufficient elements to give an affirmative judgment since the use of the term *conception* does not justify its extension to *fertilization*.[11] This has caused some authors to propose the need for a new offense, a new penal norm.[12] Doubtless, we have here the destruction of a human being, and both moral doctrine and recent statements from the magisterium call these interventions immoral and gravely unlawful. However, in the Instruction *Donum vitae*, they are not called abortion interventions, nor do they constitute the offense of abortion: "Quare Ecclesia sicut abortum procuratum damnat, ita etiam prohibet, ne vita harum humanarum creaturarum attentetur."[13] Although the same document also says, "quoniam scilicet embryon *ut persona tractandus est*, inde sequitur ut ei debeatur etiam suae integritatis defensio, idemque curandus ac sanandus sit sicut quilibet homo, quantum fieri potest, in ambitu medicae assistentiae."[14] Probably, when this canon was written, the idea of abortion independent of any reference to pregnancy was not

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9. Thus interpreted by: V. DE PAOLIS, "Responsa Commissionis Iuri Canonico Authentice Interpretando," in *Periodica* 78 (1989), p. 285; Á. MARZOA, "Extensión del concepto penal de aborto," in *Ius Canonicum* 29 (1989), p. 585.

10. Defending this opinion, J. Sanchis, "L'aborto procurato: Aspetti canonistici," in *Ius Ecclesiae* 1 (1989), p. 668; G. DI MATTIA, "L'aborto: Aspetti medico-legali e punibilità in Diritto Canonico," in *Apollinaris* 61 (1988), pp. 775–776; F. AZNAR GIL, "El delito canónico de aborto. Comentario a una respuesta de la CPI," in *Revista Española de Derecho Canónico* 47 (1990), p. 239.

11. Cf. Á. MARZOA, "Extensión del concepto penal de aborto," cit., pp. 583–585.

12. Á. MARZOA, "Extensión del concepto penal de aborto," cit., p. 585; J. SANCHIS, "L'aborto procurato: Aspetti canonistici," cit., p.669.

13. CDF, *Instructio de observantia*..., cit., p. 83.

14. Ibid., p. 79. Cf. also CCE 2275.

considered.[15] Therefore, since this is a doubtful case, c. 18 requires that it should be strictly interpreted; thus, for the penal purposes of c. 1398, such acts are excluded from consideration as abortions.

4. *Penalty*

The penalty provided by the canon is *latae sententiae* excommunication. Therefore, the penalty is incurred automatically when the act that constitutes the offense is committed (cf. c. 1314). In the 1973 *Schema*, interdict was established as the penalty for abortion; in the comments submitted, the penalty requested was *ferendae sententiae*. The *coetus* deemed that "alioquin omni efficacia privaretur, cum multi casus aborti sint occulti"[16] and retained the automatic penalty. Considering the importance of this offense today, it was not deemed timely to reduce the penalty of excommunication.[17]

For members of a religious institute, a secular institute, or a society of apostolic life, the offense of abortion is cause for dismissal (cc. 695 § 1, 729, 746, respectively). It also causes irregularity for receiving or exercising orders (cc. 1041,4°, 1044 § 1,3°).

Each abortion is a separate offense. Therefore, if anyone commits several abortions, the penalty of excommunication is incurred the same number of times.

When a repentant censured person ceases in contempt, he has the right to absolution (c. 1358). The penalty is not reserved and can be remitted by the local ordinary for his subjects, for anyone in his territory or anyone who has committed the offense therein. Within the sacrament of penance, the penalty may be remitted by any bishop (c. 1355 § 2) and by a penitentiary, including for members of the faithful who are in the diocese but do not belong to it (c. 508 § 1).The chaplains of hospitals, jails, and maritime voyages may also absolve any member of the faithful from the censure of excommunication, only in those places or under those conditions (c. 566 § 2). For cases in which it is a hardship on the penitent to remain in a state of grave sin, a confessor may remit the penalty in accordance with the prescription in c. 1357 (see commentary). It should also be taken into account that, pursuant to c. 976, any priest, even without the power to confess, can validly and lawfully absolve from any censures and sins any penitent that is in danger of death.

15. Cf. J. SANCHIS, "L'aborto procurato: aspetti canonistici," cit., p. 668.
16. *Comm.* 9 (1977), p. 317.
17. *Comm.* 16 (1984), pp. 50–51.

In addition to exempting circumstances (c. 1323), any attenuating circumstances must be verified. If there are any, the offender is not bound by *latae sententiae* penalties (c. 1324 § 3 (see commentary). Among other cases, there may be minors (c. 1324 § 1,4°), relatively grave fear (c. 1324 § 1,5°), or ignorance of the penalty attached to a law (c. 1324 § 1,9°). From this is derived, in turn, the responsibility to instruct the faithful so that the provision of the canon might be effective.

TITULUS VII
Norma generalis

TITLE VII
General Norm

1399 **Praeter casus hac vel aliis legibus statutos, divinae vel canonicae legis externa violatio tunc tantum potest iusta quidem poena puniri, cum specialis violationis gravitas punitionem postulat, et necessitas urget scandala praeveniendi vel reparandi.**

Besides the cases prescribed in this or in other laws, the external violation of divine or canon law can be punished, and with a just penalty, only when the special gravity of the violation requires it and necessity demands that scandals be prevented or repaired.

SOURCES: c. 2222 § 1; PIUS PP. XII, Alloc., 5 dec. 1955 (*AAS* 47 [1955] 64)

CROSS REFERENCES: cc. 1315, 1321, 1342, 1343, 1349

COMMENTARY

Josemaría Sanchis

1. This norm was included in the current legislation because it is considered an "instrument" that the pastoral government of the Church, directed towards the salvation of souls, cannot do without.[1] Therefore, it is important to analyze it carefully to determine the conditions in which it is to be applied and how useful it is for safeguarding communion in the church.

The norm is placed in title VII as the last canon in the section devoted to describing offenses and their penalties. Among other things, this implies that the norm designates an autonomous offense. All the common

1. Cf. *Comm.* 6 (1974), p. 35.

norms referring to the elements of an offense in the first part of book VI are applicable to this norm (external act, imputability, culpability), as are the norms referring to the requisites for determining punishability and the provisions for applying and remitting a penalty.

2. The acts that should be considered to be included in the provision of this canon and which constitute what is unlawful and punishable, as in any other offense (cf. cc. 1315 § 1 and 1321 § 1), are the external violation or breaking of a divine or ecclesiastical law.

3. From the context, it can be deduced that the term *law* should not be understood in its juridical-formal sense. Instead, it is a reference to the precepts contained in divine or merely ecclesiastical law. At the same time, it emphasizes that only juridical precepts are concerned, not simply moral precepts. However, it is not always easy to determine whether a given obligation is contained in divine law, or to what extent.

In any event, the violation must be grave. The degree of gravity is determined by both subjective and objective factors. The norm does not explicitly provide for punishing a culpable violation; therefore, only acts that are gravely imputable and committed with malice may be punished under this canon (cf. c. 1321 § 2).

4. The generic offense designated in this canon is causing harm to juridically protected goods or rights by failing to fulfill a positive or negative juridical obligation established in canon law through the various technical instruments or formal sources such as laws, precepts, etc., with the exception of custom. That means the offense consists in the malicious external violation of a divine or ecclesiastical precept. However, certain conditions or requirements are established that limit punishability ("tunc tantum potest puniri"); they also underline the exceptional nature of the norm. Such conditions, which must be met simultaneously ("punitionem postulat, *et* necessitas urget"), are the special gravity of the violation and the surgent need to prevent or repair scandal. The first condition is the assumption that there is a grave violation of the law, and the law in this specific case requires *special* gravity. However, what justifies the exceptional provision of this canon is not special gravity, but the *urgency* to prevent or repair scandal.[2] Therefore, it is insufficient that the behavior might merit punishment; it is necessary that there be urgency to prevent or repair the scandal produced by it.

5. The author of the violation may be facultatively punished with a penalty that is left indeterminate by the norm ("*iusta poena*"); this expression is paradoxically used by the Code when treating offenses of lesser gravity. Since prior admonishment (c. 1347 § 1) is required for the valid imposition of medicinal penalties or censures, some authors feel that those penalties are inapplicable to the case covered by this canon because, if

2. Cf. P. CIPROTTI, "Elementi di novità nel diritto penale canonico vigente," in *Monitor Ecclesiasticus* 114 (1989), p. 26.

they were, how could the canon be an effective instrument in emergency situations? About expiatory penalties, application of perpetual penalties is excluded (c. 1349).

6. Evaluation of the urgency of applying the punishment is incumbent upon the ordinary who may initiate the penal procedure, not on the judge. The penalty may be applied either by decree by the ordinary when following the administrative path, which is prohibited in the cases established by c. 1342 § 2, or by a sentence from the judge or court in a judicial process. In addition, the attenuating circumstances indicated in c. 1324 § 1,9° must be kept in mind; according to that norm, the penalty should be mitigated or substituted by a penance if the offense was committed by "one who through no personal fault was unaware that a penalty was attached to the law or precept."

All of the above leads to the conclusion that the actual scope and practical operability of the juridical instrument provided in this canon is very limited, almost nonexistent. Only with difficulty can it be considered a pastorally effective measure against urgent and grave situations that can be more speedily resolved with greater effectiveness and justice by other means, including non-penal ones, as provided by law; for example, by correction (cf. c. 1339 § 2).

7. This canon may have the merit of demonstrating that a simply formalist, not to say positivist, conception of offenses is unacceptable. However, not only is an abstract principle of public law established therein, according to which the authority "may threaten to penalize" grave violations of canonical norms, but it is intended to be a norm that can be directly applied. In other words, it is a norm that allows a penalty to be imposed that has not been previously established and thus introduces an element of distortion into the Church's penal system that is unjustified because of the disproportion of the norm's meager virtues. It raises more important problems than it resolves.

It may be that c. 1399 deprives of their meaning the canonical provisions on exercising legislative and preceptive power in penal matters, thus rendering them useless. Those powers are the fruit of a prudent, responsible exercise of the power of governance that can counter behavior that causes grave harm to communion. On the other hand, the norm favors a passive attitude by the authorities, since, in any case, a penalty can be applied if there is particularly grave behavior that causes grave scandal. But, the use of the discretional faculty that this canon grants runs the risk of being transformed into arbitrariness that endangers communion, the good of the Church and the rights of the faithful.

In addition, the solution adopted by the Code to the problem is not the only possible response. According to many authors, it is also not the best solution for the good of the ecclesial community. In such situations, an effective instrument that respects the requirements of justice is the use of a penal precept (cf. c. 1319).

cafola • Bonfils • Bonnet • Borras • Calabrese • Calvo Alvarez
enalmor • Ciáurriz • Cito • Coccopalmerio • Combalía • Copp
León • De Otaduy • De Paolis • De Salas • Di Mattia • Doran •
tes • Furst • García Faílde • Gefaell • Gil de las Heras • Gómez
utiérrez • Gutiérrez-Martín • Herranz • Hervada • Iglesias • Illa
arcón • Loza • Llobell • Madero • Mantecón • Marchesi • Marz
as • Molano • Moneta • Montini • Morrisey • Navarro • Navarr
• Petroncelli-Hubler • Pettinato • Punderson • Ramos • Retam
• Sanchís • Santos • Schouppe • Schunck • Sobanski • Soler •
a-Pemuelo • Vega • Viana • Viladrich • Zubert • Abad • Andrés •

LIBER VII
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INTRODUCTION

Carmelo de Diego-Lora

1. It was a good idea to make the book regulating processes in the Church the last one of the *CIC*, since procedural norms in a juridical system are those that complete the legislative work. It is not sufficient for the legislator to proclaim what juridical conduct must be. The provisions ordering behavior for the organs of public power and the particular members of society according to justice demand the natural concomitant of procedural norms, which guarantee compliance with this behavior and actual respect for those rights, through the protection entrusted to the public organs of judicial power.

The guarantee of compliance offered to every juridical system by the juridical institution of the process usually uses coercion to become effective. However, it does not necessarily require it, especially when the recipients of the norms and the passive subjects of judicial decisions are governed by a sense of obedience to authority and the requirements derived therefrom for personal conscience. Then, the prestige of authority from which they arise and the force of conviction carry more weight than the pronouncements by public power provide to reason. In canon law, the exercise of the judicial function is as necessary as in laws that only contemplate the proper functioning of civil society and its justice. The canonical code is a primary code that requires the appropriate technical-juridical

instrumentation so that peace and justice may be autonomously and sufficiently achieved in the community of the faithful.

To achieve its own objective, every society needs not only norms intended for the majority of its members or differentiated groups within that majority, but also norms that arbitrate specific solutions for particular public or private, individual or collective, persons. The ecclesiastical *communio* endures despite disagreements between its members, resistance to obedience, mistakes in the assessment of the facts or the law, or when these components use a distorted interpretation, malice, or fraud to selfishly satisfy their particular interests. Doing justice in the community must be performed amidst conflicts of interests, possible violations of legislative provisions and regulations conceived by the legislator and by other organs having normative power for the peaceful ordering of society.

The *congregatio fidelium* takes part in the means of salvation instituted by Jesus Christ, but in turn it is organized in a complexity of intersubjective relationships between authorities and subjects, in which reciprocal rights and obligations, duties, responsibilities and burdens are generated. Compliance with these rights and obligations determines whether social peace and justice will reign. Faced with a possible occurrence of injustice, anyone whose rights are violated must be provided with the specific process suitable for protecting him or her against a concrete injustice he or she feels or claims to suffer. With that, the subject feels protected by the system against any threat or violation that may offend the justice that must prevail among men.

2. Canon 391 describes how the office of governing that belongs to the diocesan bishop in his particular church includes the "legislative, executive, and judicial power, in accordance with the law" (§ 1), and specifies that this latter power is exercised "either personally or through a judicial Vicar and judges, in accordance with the law" (§ 2).

This note of *submission to law* is stressed even more when it is noted that judges and tribunals, who have this power according to c. 135 § 1, must exercise it "in accordance with the law." This method corresponds to what is contained in the *CIC* under the general heading of book VII, *De Processibus*. Moreover, in the universal Church, by virtue of the supreme power that devolves upon the Roman Pontiff (cf. cc. 331–333), to him belongs expressly the exercise of this power, personally, "or through ordinary tribunals of the Apostolic See, or through whom he delegates" (c. 1442; cf. *Pastor Bonus* 121–130).

3. The judicial office exercised in the Church by judges and tribunals must be performed in observance of, as indicated by Pope Paul VI,[1] a healthy juridical formalism, by which one can prevent arbitrariness in

1. Cf. PAUL VI, *Addresses*: January 27, 1969, in *AAS* 61 (1969), pp. 174–180; January 28, 1971, in *AAS* 63 (1971), pp. 136–142; February 8, 1973, in *AAS* 65 (1973), pp. 95–103.

prejudice to the souls, with the judgment to be issued from the judge's consideration depending on the proofs and indications, which task particularly compromises the conscience of him who has the judicial power in each case. Therefore, the exercise of judicial power always requires a typical *modus operandi*, which is peculiar to the activity characteristic of judicial power, an activity that is performed through *procedures*, subject to juridical forms established by law. Paul VI believes that "even the laws regulating the procedural event have, in the ecclesial system, an intrinsic raison d'être; they are the fruit of proven experience and, therefore, must be observed and respected ...; the canonical procedure must be, therefore, accepted with due obedience and followed with great care, without yielding to facileness, ending up favoring permissiveness, in detriment to the law of God and with prejudice to the good of the souls."[2] In turn, judges and tribunals must work with the required *independence* (cf. cc. 147 and 148; 1454 and 1456), determined by the evidence brought to the process (cf. c. 1608 §§ 1–3), which would lead them in conscience to issue a ruling only compromised by the just resolution of the specific case argued before the competent judicial see.

4. Nevertheless, the manner of proceeding in canon law must always have the correctness of the *aequitas* as a balancing factor in the mental process that the judge must perform when pronouncing judgment. The work of justice that operates through the process does not consist only of a rigid application of the law, nor can the interpretation of the law be a mere result of an academically conceived syllogism. Rather, it consists of an act of the virtue of wisdom that, after weighing all the circumstances, reaches the decision that is just in the concrete case.

However, one should not forget the pastoral dimension that all service rendered in the Church should include. Canon 1752 refers to the compulsory transfer of the parish priest. However, it contains a general principle that must inspire all procedural behavior, providing that one must act "servata aequitate canonica et prae oculis habita salute animarum quae in Ecclesia suprema semper lex esse debet."

In fact, in the *Address* of Pope John Paul II on February 4, 1980, the Roman Pontiff stressed the objectivity that is characteristic of justice and the process, specified in the *quaestio facti*, to cause adherence to the truth and in the *quaestio iuris*, which entails faithfulness to the law, such that it is possible to repeat what was written by M.T. Ciceron, that the judge is the law itself talking, magistratum legem esse loquentem.[3] These statements affirm the principle of the primacy of law in the service of indissoluble marriage and of family stability, directly protected by the canonical legislator. The ecclesiastical judge must know that he is subject to

2. *Address*, January 27, 1969, cit.
3. *De Legibus*, L. III, no. 1, 2, Ed. by the Association G. Budé (Paris 1959), p. 82.

law and act accordingly. In his work, he must also speak of faithfulness, as obedience to law.

5. In canon law, the fundamental and primary characteristic of the word "process" is consecration of the *principle of procedural legality.* This is compatible with the fact that the activity of the Church must be in the service of souls. As Rincon-Perez wrote, "in order for a juridical-canonical activity to be pastoral, it does not even need the word 'pastoral' added to it and even less to stop being juridical: if, because of the needs of the matter, an ecclesial activity must be of a juridical nature, it will better and more suitably perform its *pastoral* function the more it submits to the rules governing the juridical activity, that is, the better it meets or realizes the demands of justice."[4] He adds, referring to judgments of nullity of marriage, "it is not possible to speak of benevolent judgments as opposed to rigorist or legalist judgments, but rather of just or unjust judgments."[5]

If that is true when resolving issues on the merits, it must equally be observed when applying procedural norms, because they guarantee justice in the concrete case when using the formal instrument for carrying out law, namely, the process. The legislator assumes an equitable interpretation of canonical procedural law on various occasions. For example, c. 1670 authorizes the judge in an oral contentious process to not use the procedural norms characteristic of the ordinary contentious trial, compliance with which is not required for validity, to achieve greater speed, even if this measure must be adopted by a reasoned decree of the tribunal, and without being in detriment to justice. In addition, the law provides that, in causes of nullity regarding impotence or lack of consent, the judge can dispense with expert proof when it is obviously pointless, as authorized by c. 1680. Moreover, in the procedure for the dispensation from ratified but unconsummated marriage, c. 1703 § 1 allows the acts to be published if the judge believes that the proofs presented can cause a serious obstacle for the plaintiff's petition or for the respondent's exception, prudently making it known to the interested party, etc.

Therefore, the principle of procedural legality is compatible with canonical equity. A relevant example is c. 1452, which grants the judge important powers of initiative and procedural substitution, although c. 1501, in order to avoid any doubt, found in favor of the most absolute principle of party initiative, be it a private party, or when applicable, a public party (cf. cc. 1430–1431, 1674,2°, 1708, 1721).

6. In his *Address* of January 24, 1992 given to the Roman Rota,[6] Pope John Paul II shows that, jurisprudence, in connection with causes of nullity of marriage, should be understood as emanating exclusively from the

4. T. RINCÓN-PÉREZ, "Juridicidad y pastoralidad del Derecho canónico (Reflexiones a la luz del Discurso del Papa a la Rota Romana de 1990)," in *Ius Canonicum* 31 (1991), p. 251.

5. Ibid., p. 252.

6. Cf. *Comm.* 24 (1992), pp. 3–6.

Rota, in accordance with *Pastor Bonus* 126, which attributes to the Rota the function of assisting lower tribunals and contributing with judgments along with jurisprudence. The Roman Pontiff stresses the delicate task of the intermediary function that the judge is called to perform between the canonical system and the subjects submitted thereto. With that mediation, the majesty of canon law tends towards the concrete reality in which the faithful act, to weigh it in the particular circumstances.

In this way, the personalist objective of the juridical norm is described. The strict principle of legality should be applied, with appropriate adaptations in each case, to the man who is its recipient.

Thus, the principle of procedural legality is adapted to the concrete demands of general procedural stages and situations in the evolution of procedural juridical acts. For this adaptation, the *aequitas* is a balanced criterion for interpretation. In this task, the judge's wisdom shall apply procedural law using the same criteria of equity that the law itself offers him, (see above, no. 5) and any criteria that have evolved from the jurisprudence of the Rota.

7. Together with faithfulness to the law, characteristic of the *quaestio iuris,* the process, with regard to the *quaestio facti,* must stress the truth. Reference has been made to a *Address* of Pope John Paul II that stressed how the judge (see above, no. 4) must pay attention to those two aspects found in every litigious issue and how they must be considered with equal intensity for him to duly fulfill his function in the interest of justice. It now seems appropriate to recall the *Address* pronounced January 24, 1981 to the Rota.[7] In this allocution, the Roman Pontiff refers to the need for "faithful application of substantive norms" but describes as "rash" any innovation in substantive or procedural law that does not correspond to the jurisprudence or practice of the tribunals and dicasteries of the Holy See. In turn, he shows the *care* that the ecclesiastical judge must take in "reaching the knowledge of the objective truth, that is, either the existence of a validly contracted matrimonial bond or its non-existence."

If faithfulness to the law implicitly involves a reference to the activity of the process, with the demands of successive acts by which the process unfolds, knowledge of the objective truth refers to the facts in question, which are those that adapted to the law, provide the judge *moralis certitudo*, which he must obtain *ex actis et probates* (cf. c. 1608 §§ 1 and 2).

In this way, the process appears as a formal instrument for the application of law and for learning the truth. It is also a system for finding the substantial truth presented therein, which at the beginning is hidden from the judge, just as for the parties it is offered, in most cases, as litigation. All

7. I had the honor of referring to him in "La función judicial, función pastoral de la Iglesia," in *Ius Canonicum* 21 (1981), pp. 629–640.

probative activity tends to make that truth revealed with precision before the judge, because without this knowledge, any attempt to apply the law would be an exercise in futility. Therefore, as John Paul II described it in his 1980 *Address*, the administration of justice entrusted by the Church to the judge is "a service to the truth." In the *Address* of January 25, 1988,[8] John Paul II, recalling a doctrine already taught by Pius XII in 1944, indicates that the defender of the bond "è chiamato a collaborare per la ricerca de la 'verità oggetiva' circa la nullità o meno del matrimonio nei casi concreti;" and how that interest in the objective truth must lead him to take special care in his intervention when hearing expert evidence. Moreover, citing his own 1980 *Address*, he insists that the "effettiva ricerca della verità" must always be "fondamento, madre e legge della giustizia."

In applying canon law, every process is sorted out, because this juridical operation is what provides the justice of the concrete case. Thus, the process has an objective that is above and beyond the interests of the parties. Moreover, the interested subjects, by being incorporated into the process, are subject thereto, regardless of the parties' intentions. If the canonical process springs from party initiative, once it is admitted by the judge or tribunal (cf. cc. 1501, 1505 § 1), the parties will seek to claim and prove whatever facts they believe support their rights (cf. cc. 1504,2°, 1526 § 1). Nevertheless, the canonical norms do not reduce the judge to a mere passive organ directing and receiving the parties' activities, but rather authorize him to spontaneously and directly question the parties (cf. c. 1530) and to weigh the evidence according to his conscience, subject to the provisions of canon law (cf. c. 1606 § 3). Lastly, he is allowed to compensate for the parties' negligence by presenting evidence or filing exceptions, if he finds it necessary to avoid a gravely unjust judgment (cf. c. 1452 § 2).

The *canonical process*, conceived in this way, appears from the start as a group of activities of formal law that instrumentally tend unitarily to meet a permanent objective purpose, providing justice in the concrete case.

8. Faced with the various theories by which juridical doctrine has attempted to unify all procedural events and activities to give the whole a unitary juridical character, in canon law, the doctrine of the *juridical institution* best responds to that broad and varied phenomenology that evolves between the parties and judge or tribunal, and at times with third parties as well, in that broad field of formal activity which is the process. All activities that evolve in the form of a process have no objective other than that of administering justice, through the investigation and knowledge of the truth being tried, to which canon law is applied, which moderated by equity serves the supreme law of the Church, the salvation of souls.

8. Cf. *Comm.* 20 (1988), pp. 69–75.

This doctrine describing the process as a *juridical institution* is influenced by the doctrine maintained in Spain by Professor Jaime Guasp in his "Commentaries on the Law of Civil Trials."[9] After an incisive criticism of the theories that defined the process as a *contract* or *quasi-contract*, and subsequent theories at the time when they believed that its juridical nature was that of the *procedural juridical relationship*, or that which held that the process was like a *juridical situation*, Guasp established the doctrine of the juridical institution. By this term, he means "not merely the result of a combination of acts tending towards an objective, but a complex of activities related to each other by the link of a common objective idea, adhered to by the diverse particular wills of the subjects from whom that activity proceeds, whether or not that is their specific objective. Therefore, the institution consists of two fundamental elements that are the woof and warp of a fabric: the objective idea, which is situated outside and above the will of the subjects, and the wills as a whole, which adhere to said idea in order to be realized."[10]

A series of consequences arise from this conception, which also take place in the canonical process: *a)* the process is a permanent juridical reality; *b)* its objective nature, determined by the objective idea, which is always superimposed on the wills of the subjects who are parties to the process, by which these subjects, even they take the procedural initiative and are in a situation of subjection to the process and to the public objectives pursued by the process; *c)* even if the parties to the process are situated on an equal level, the hierarchical idea is so consubstantial to the process that there will be a level of inequality or subordination; *d)* the will of the procedural subjects can only change the process itself, once initiated, to the extent that it is permitted by the fundamental idea that governs it; therefore, the provisions contained in procedural law have the force of *ius cogens*; *e)* lastly, in the process a complex of links and connections is generated, which can be redirected to the two large juridical categories of subjective rights and obligations, but in the process, as independent categories, the duties and powers or attributions also deploy their efficacy: the objective finality will be the idea that makes the juridical reality of the process permanent, and that sense of finality will unify all the activity of interpreting and applying the law in the formal juridical field of the process.

9. In the sphere of juridical realities, the process occupies its own place, which corresponds to a field of juridical phenomenology where the justice of the concrete case is specifically carried out, and the concept thereof includes a series of characteristic elements, which are: *a)* a connected series of formal juridical acts, which occur in a temporal period;

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9. Cf. J. GUASP, *Comentarios a la Ley de Enjuiciamiento Civil*, I, 2nd ed. (Madrid 1948), pp. 17–25.
10. Ibid., p. 22.

b) a space of a formal nature in which these acts are carried out, that is, before the judge or tribunal of justice; *c)* its initiation occurs because of a claim duly formulated by one subject against another, regarding some specific *petitum* and it must be founded at least on *fumus boni iuris* (cf. c. 1505 § 2,4°); *d)* this claim must be admitted by the judge or tribunal, to whom it is directed, in order that the organ of judicial power can formulate a binding and definitive pronouncement by which preexisting facts or juridical phenomena can be recognized and declared, or constituted through their creation, modification, or extinction, or pronounce declarations for the imposition of conducts (commonly called sentences) which will fall on the subject against whom the claim is directed; and *e)* the claim must concern persons, things, or other phenomena of the juridical reality, which matter is subject to the jurisdictional power of the Church.[11]

The confrontation between the parties and their subordination or subjection to the judge suggests the idea of a procedural contention (cf. cc. 1504,1°, 1507–1508, 1512–1513, 1517); and thus the *CIC*, in this book, uses the adjective *contentious* in the headings of part II and its sections I and II. The fact that the claim is directed to an organ of judicial power always shifts the claim, even if it refers to subjective rights or private interests deserving juridical protection belonging to private parties, to the sphere of the public law of the Church, such that procedural law is a public law par excellence—hence the nature of its norms that mostly belong to the *ius cogens*.

The claim must contain the *petitum* which later will come to make up the *dubium* or the *dubia* of the process (cf. cc. 1513, 1677 § 3), which can be designated as the *object of the process*, on which the judge or tribunal must pronounce, issuing its *iudicium*, in the form of a judgment. The judgment must answer each of the doubts presented (cf. c. 1611), expressing it with mere statements, juridical constitutions, or imposing duties which are translated into conducts, that they are to give, do, or refrain from doing something.

10. The ruling that is pronounced, issued in the form of a judgment, historically characterized in this way the process as a whole that it has called indistinctly by the name of *iudicium*, and this terminology is used by book VII in its headings for parts I and II, as well as in section I of part II. This ruling in the form of a judgment is binding in its pronouncements on the parties to the process, once the judgment acquires finality, that is, becomes an *adjudged matter* (cf. cc. 1641, 1642), at which time it can make way for an activity, designated by the *CIC* under the title *De exsecutione sententiae* (cf. part II, sec. I, tit. XI; also, cc. 1684–1685).

11. For a conceptual overview and comprehensive understanding of the process, cf. C. DE DIEGO-LORA, introductory commentary on book VII, in *Pamplona Com*, p. 869.

The promulgation of the new *CIC* would have been the right time to unify the terminology and avoid this indiscriminate usage between the word "process" and the word "trial," even if this latter term has a long historical tradition and widespread use in curial language.[12] The same goes for the term *cause*, which this book VII also uses indiscriminately (cf. part II, sec. I, headings for titles I, V, and VI) for greater identification with the process itself (cf. part III, tit. I, chap. II, and tit. II).

The word *cause* is used more when referring to the process related to a given juridical matter, in which the *causa petendi* has its roots, and from this point of view, the *CIC* uses it when it mentions causes on the separation of spouses (cf. pt. III, tit. I, chap. II), or those causes the objective of which is to declare nullity of sacred ordination (cf. pt. III, tit. II). In the same way c. 1403 uses this term when it refers to causes on canonization, even if they have been correctly excluded from the provisions of book VII, due to their very specific nature, quite different from all that could be understood as included in the broad field of the administration of justice in the Church. In other canons, the term "causes" is used, usually with reference to specific juridical subjects, as in cc. 1401, 1442, 1643, and 1644, without preventing other canons from using it to identify it with the term process, as for example when tit. IV is designated *De partibus in causa*, and chap. II, tit. V of sec. I, part II *De interventu tertii in causa*.

On the other hand, the word *procedure* is properly used when the *CIC* places it in headings that are excluded from the exercise itself of the *potestas judicialis*, in pt. V of book VII, dedicated to administrative procedures and recourses, outside of the party confrontation before the independent organ of justice, a permanent characteristic of the process. This does not mean that the process excludes the procedure; on the contrary, it needs it because the steps to be followed, their activity, are procedural. What should be rejected is the confusing idea that process and procedure are equivalent terms.

In this sense, it would have been more correct, in good procedural doctrine, if chap. III as well as IV of tit. I of part III had not used the word *process*, but rather *procedure*. In the first place, because it is noted that what c. 1707 offers in its provisions is a method of a subsidiary nature, for when one cannot reliably prove the death of one of the spouses, for the purpose of having the diocesan bishop, after appropriate investigation, establish with moral certainty a presumption of death, that, as such, only has the force of *iuris tantum*. This declaration does not arise in a situation with a confrontation of parties. It takes place without a need for a *litis contestatio* (cf. c. 1513) or a judicial instance (cf. c. 1517). And in the second place, with respect to ratified but unconsummated marriage, one desires no other result than to obtain a dispensation from the Roman

12. Cf. P. MONETA, *La giustizia nella Chiesa* (Bologna 1993), p. 69, note 1.

Pontiff (cf. c. 1698 § 2), and in the activity that takes place for this purpose, one can only seemingly find a similar process at the instruction phase, the procedure of which does not originate in a confrontation between parties, nor lead to a binding judicial decision, but to a sole issuance of a vote by the instructor, consisting of a mere enlightened impression regarding the opinion resulting from what was investigated (cf. cc. 1702, 1704). It only serves as a preliminary step for other decisions of a distinct nature, characteristic of another juridical area of the Church distinct from that in which the *potestas iudicialis* performs its function. Although c. 1701 mentions the *pars conventa*, it lacks the rights characteristic of a true party to the process, and in this sense, it can be seen that the word *orator* is properly used for the petitioner (cf. also c. 1699 § 1), instead of plaintiff, which only would have caused confusion. The presence of the defender of the bond in the procedure (cf. c. 1701 § 1) does not go beyond being one more guarantee of cooperation in the discovery of the truth, and his opinion (cf. c. 1705 § 1) only serves as advice and assistance in order that the one who has the power to grant the grace may act with the appropriate advice from persons who are authorized by their public office.

11. Lastly, it should be added that cc. 1713–1716 are also included in the word *de processibus*, under the heading *De modis evitandi iudicia*, by which are also included under that first category precisely those contracts (the transaction, the compromise, and arbitration) which have the common and fundamental characteristic of avoiding processes or conventionally putting an end to those already initiated, preventing a judgment from being pronounced. The ordering is self-contradictory, but it shows that when the object on which a dispute arises is a private good and it belongs to private parties , and so they can freely use their rights and defend their interests, ecclesiastical legislation shows its preference more for a contractual solution than for a formulation of claims before a judicial organ in order that it rule in justice. On the other hand, the fact that the arbitration trial usually adopts external forms of procedure similar to those of the activity of the process does affect the ordering, which is why juridical doctrine has acknowledged its para-judicial nature.

The fear of legal commotion has led to a belief that "processes are always a type of necessary evil, because they involve the existence of a conflict of rights and require the commitment to an individual and ecclesial activity intended, in the best of cases, to simply restore the altered juridical order."[13] In fact, the evil does not lie in the process but in the conflict, which precedes the process. In any case, the process will prolong the conflict if it is not resolved quickly by a willing agreement that freely settles the issue posed. In any event, given the prohibition set forth by c. 1715 § 1

13. J.L. ACEBAL, commentary on c. 1713, in *Salamanca Com.* The same commentary applies to c. 1446 (cf. ibid.).

on validly agreeing to transactions and mutual promises in matters which pertain to the public good, and given the prevalence that this type of good has in the canonical system, rarely could one be allowed to use contractual means as a way of settling disputes, when they arise between the faithful and the organs of the ecclesiastical administration.

Moreover, among the faithful, processes on nullity of marriage occupy to a disproportionate degree with respect to other processes, the ordinary activity of the ecclesiastical tribunals. However, nullity of marriage belongs to the public good, and therefore there is no agreement that can settle the dispute once it arises. All that would be allowed is a renunciation of the action for nullity by whoever is going to present it, or a renunciation of the instance if there was already a challenge (cf. cc. 1424–1425). That is why c. 1676 can only recommend that, before accepting a cause of nullity, the judge, if he sees possibilities of success, explore the wills of the spouses in order to pastorally urge them, if they wish, to validate their marriage. On the other hand, separation processes offer the judge greater possibilities of obtaining a peaceful result between the spouses. Nevertheless, in these cases, it is not a matter of having the spouses use settlements or mutual promises because the separation also affects the public good (cf. c. 1696). The judge will pastorally seek to have the spouses abandon their complaints and reconcile (cf. c. 1695).

This legislative desire in favor of mutual agreements and peaceful solutions is particularly manifested as an innovation in the new *CIC* in the sphere of procedure characteristic of the recourse against administrative decrees, in c. 1733, providing an organ of mediation offering, "aequas solutiones quaerere et suggerere," according to c. 1733 § 2, equitable solutions accepted by the author of the decree as well as by the person who feels prejudiced thereby.

12. The peaceful intentions on the part of the ecclesiastical legislator are not characteristic of such a process, or are they even exclusively related to the institution of the process, even though c. 1446 has been included in book VII. The peace belongs to the Church in its entirety, and therefore the evangelical precept of peace belongs to the entire canonical system. That responsibility for zeal in the search for peace that c. 1446 attributes, at the beginning of the litigation and at any subsequent moment, to bishops, judges and all the faithful, is derived from a norm that permeates the entire juridical patrimony of the Church; just like that of c. 1752 when, in the application of the law, even though it refers to a specific legislative hypothesis, it calls for canonical equity and salvation of souls, which must always be the supreme law of the Church.

PARS I
De iudiciis in genere

PART I
Trials In General

INTRODUCTION
Carmelo de Diego-Lora

1. By taking into account the heading of part I of book VII in connection with the heading of book VII itself ("Processes"), one immediately notes the undifferentiated use by the *CIC* of the words *process* and *trial.* The term *trial* is used in this heading in the same sense the term *process* is used in the general heading of book VII, but the latter term will be used in this commentary.

2. What do the words "in general" mean in reference to the word *process*? In principle, these canons are applicable where there is a true contentious process, not where there is only an administrative procedure. In the latter case, no independent organ exercises the *potestas judicialis*, even if some attributions of directive and investigative powers may coincide for the sake of expediency when they are externally similar to the exercise of judicial power. In these cases, there are occasions for certain norms related to tribunals to be applied. Nonetheless, cc. 1404–1416, which provide rules determining the competence of judges and tribunals, are not applied in such procedures, nor are the concepts of plaintiff and respondent taken into account, since there is no contention in the strict sense. Therefore, juridical assistance and representation will have a limited, incidental need to be observed (cf. title IV). Finally, these procedures dispense with the concepts of action and exception, which are intimately related to procedural confrontation and which are the ultimate reason why the world of juridical relationships becomes a procedural contention (cf. title V). They are also why what was described previously as belonging to the sphere of private rights and interests is shifted to the public sphere of judicial power and the regulated activity of the organs that serve the public good of realizing justice in the Church.

Therefore, the canons included in part I have little to do with the procedures regulated in book VII in part III, title I, ch. III and IV, and with what is provided in title III of this part, as well as with the canons included in part V. If at any time they apply to those procedures, it will not be for essential juridical reasons. Therefore, that *generality* referred to in the heading of part I does not include the provisions for these procedures.

3. The provisions of part I are the fundamental elements that structure the process, without prejudice to the fact that there are canons in part II regulating other fundamental aspects of the process in general, such as those that refer to party initiative, the constitution of the procedural juridical relationship, evidence, recourses or the adjudged effect of definitive judgments that have acquired finality. Among these fundamental aspects, one should not forget the execution of judgments, a subject that in the organization of the *CIC* is separated from part II. Nevertheless, the foundational elements constituting the structure of the process are contemplated and regulated in part I.

Some of the canons of part I belong to procedural requirements, such as cc. 1400 and 1401, which respectively indicate the possible object of *iudicium* and the juridical material over which the jurisdictional power of the Church is extended to issue these *iudicia* through the process.

Intimately related to the object of the *iudicium*, it is necessary to regulate the reason justifying why the juridical object becomes an object of the procedure, that is, what is called the *causa petendi*, the cause of action against another, conferred as the juridical power of the subjects of the system to turn to the organs of justice and be served procedurally until the judgment is pronounced, namely cc. 1491–1500, related to the procedural action. These canons also contain the necessary references to the option that must be offered so the opposing juridical power may exercise any defenses that may be raised against the action. In the provisions of the *CIC*, these defenses adopt the forms of exceptions and counteractions, although counteractions correspond to the concept of the action called by the *CIC* the counteraction.

Due to their intimate interrelationship, what is the object and matter of the trial, what is provided with respect to the action, counteraction and exceptions, , is placed with a unitary treatment in part I of book VII. However, the norms related to the object and matter of the process are situated in some introductory canons, while actions and exceptions are located separately in the same part, in title V. The *CIC* includes c. 1403 among these introductory canons, since it provides for the causes of canonization of the servants of God, referring them to a particular pontifical law, although, since it is procedural, the procedural norms of book VII can be applied to it.

4. The organization used by the *CIC* for these elements of the canonical process seems to indicate that what concerns the organization and exercise of the *potestas iudicalis* comes before anything concerning the

rights and interests of the people of God. These rights and interests are those deserving judicial protection and what justifies the existence of some judicial organs, their competencies and a discipline for optimal functioning of the organs of judicial power.

The ordering criterion followed in this part I contrasts with the organization of book II ("The People of God"), part I of which discusses the Christian faithful. Part II regulates the hierarchical organization of the Church, in its deaconry for the people of God entrusted to its care. This innovation in the Code, a result of Vatican Council II, is emphasized in the Apostolic Constitution *Sacrae disciplinae leges*. Nevertheless, it is impossible to say which is first or second in importance, since the people of God can not be conceived of without the Christian faithful or the ecclesiastical hierarchy in their service as their deacons.

On the other hand, that coincidence, at least from a chronological point of view, does not occur at the time of the exercise of the *potestas iudicialis*. The judicial organ has no occasion to exercise its *potestas* without a prior plea from the interested party (cf. c. 1501). The process cannot take place without an act of petition by a party (cf. c. 1502), duly formulated (cf. cc. 1503, 1504), in order to proceed to its admission by the judge or tribunal of justice (cf. c. 1505). Until this party initiative takes place, the process cannot begin and the organ of judicial power will not be able to act in direct service to the administration of justice among the people of God.

In this regard, the drafters of the *CIC* followed the guidelines offered by the *CIC*/1917 in its book IV, part I. The *CIC*/1917 established a systematic order in which the weight of the hierarchical element of the Church was emphasized. That was also noted in the organization of book II, radically changed in the current *CIC*. This organization, a result of an ordering based primarily on the hierarchy, is maintained in part I of book VII of the *CIC*.

This issue is not foreign to modern juridical procedural doctrine. Some writers and works on procedural law begin with the organization of the judicial power and the attribution of competence to the various organs of justice. Others conceive of procedural law as a system of juridical guarantees, in which priority lies with the interested subjects for whom justice is administered, and the rights and interests which devolve upon those parties to the process to exercise to be protected by the organs performing the service of the administration of justice in secular society.

5. Although book VII of the *CIC* divides what was part I of book IV of the *CIC*/1917 into different parts, the first five titles of part I of book IV of the *CIC*/1917 coincide with the five titles that make up part I of book VII of the *CIC*. It repeats the exception that the first canons are excluded from any title that might cover them, which allows them to be classified as introductory canons.

The *CIC* highlights the particular legislative consideration already indicated, which excludes causes of canonization from its provisions by the *CIC*. It is especially interesting to highlight c. 1402, which contains a provision by virtue of which the tribunals of the Church (except the apostolic tribunals, which are governed by their own norms) are obligated to observe the canons that follow: *reguntur canonibus qui seguuntur.*

The canons that follow are not only those of part I, but all the canons of book VII. This canon does not mention the obligatory nature by which the parties and all those subjects who act or can act in the process are obligated to comply with the procedural laws intended for them. But, the *CIC* has first focused on the judicial organs, by converting them, in this canon, into *the main recipients and those who are primarily obligated to* comply with procedural law. Perhaps this is because it is understood that these organs are not only those called to observe the procedural canons, but those who are particularly obligated to see that they are also observed by others: by all those subjects who are in the process or are incorporated into it, as parties or at least as those called, who come to the process either to assist or represent, as intervening third parties, experts or witnesses.

In fact, c. 1402 exceeds the systematic limits into which part I is inserted. It is definitely a general provision, preliminary to any other canon, and t it could have had the introductory nature that it has today, but covering the total obligation to observe procedural law affecting all of them. It also has a certain concomitance with canons, such as 1670 and 1691. This provision was present in the *CIC*/1917, and although it was situated among the introductory canons, it appeared as an almost hidden provision contained in § 2 of c. 1555, §§ 1 and 3 of which have disappeared from these introductory canons, along with the provisions of c. 1554 regarding the penal defense of the old privilege of the forum, in connection with causes with a mixed forum, which has been deleted from the new code.

It should be acknowledged that the procedural system, as a whole, as noted in this part I, essentially retains the criteria that inspired the first five titles of part I of book IV of the *CIC*/1917.

6. The new canonical procedural system uses a fundamental concept that remains the same: that of action. Canon 1491 repeats c. 1667 *CIC*/1917, and what it does not take from it is included in c. 1492 § 2. Therefore, along their main lines, there is a complete agreement between the process of the *CIC*/1917 and the process of the current *CIC*. It is the old concept of Roman law, by virtue of which each right is protected by an action. This is the very protection by law attributed to persons. The broader concept of juridical interest deserving protection has been dispensed with. Thus, the action is confused with the subjective right, in that it is nothing more than this same right put into motion, activated for its procedural protection.

The *quodlibet ius*, that is protected by procedural action, and from another perspective by the exception, is necessary in the *CIC* to relate it to the provisions of c. 221 regarding general protection of the rights of the faithful. There is more explanation in this regard in the *CIC*, but the concept of action still suffers from insufficient treatment, based more on a statement of rights deserving judicial protection than on defense of the person, who can also be prejudiced in connection with another type of interests, which in principle equally deserve to be taken into account, in that their protection is just.

From the point of view of the duties and responsibilities of the hierarchy, the broad protection of subjective rights demanded in principles nos. 6° and 7° of the General Assembly of the Synod of Bishops of October 1967, set forth in the *Praefatio* of the *CIC*, has become effective. However, from the subjective point of view, book VII has not provided enough juridical power of judicial protection to persons whose legitimate interests have been prejudiced. It would be more accurate to maintain what was stated when it is noted that c. 1400 § 2 provides that disputes resulting from an act of the administrative power can only be taken to the superior or administrative tribunal. In fact, in the *CIC*, the judicial means for these disputes is exclusively attributed to the Supreme Tribunal of the Apostolic Signatura (cf. c. 1445 § 2 and *PB* 123).

The protection of these legitimate interests must be found in the *CIC* through means other than those resulting from procedural provisions. They are usually situated, within the legislative text, in canons belonging to juridical spheres of substantive law, in which it is noted that certain interests, independent of their consideration as subjective rights, when deemed deserving of protection, are also protected by the *CIC*, and can find that protection in the canonical process.[1] It is through these means that new channels can be found for more extensive judicial protection, not reduced merely to the holders of subjective rights, where one will find the breadth of a standing *ad causam* more in keeping with the protection of the legitimate interests of human beings.

7. Canon 1476, the text of which is different than its equivalent (c. 1646 *CIC*/1917), contributes to that greater sphere of juridical protection provided by the process, derived from a split from the concept of action in c. 1491, which also influences a more open concept of standing *ad causam*. In this case, one can observe the effect of a concern felt at Vatican Council II (cf. *GS* 29) to avoid any phenomenon that could be considered discriminatory, especially for religious reasons. The concept of juridical capacity, however, is intimately related to baptism, which establishes the baptized person as a person for the Church and a recipient of ecclesiastical laws, and therefore a holder of rights in the canonical system,

1. Cf. C. DE DIEGO-LORA, commentary on c. 1491, in *Pamplona Com.*

rights of the faithful (cf. cc. 82 and 11, in connection with 221). However, the capacity to act depends on the Christian's age and good mental condition to be able to take responsibility for their acts of disposition of rights and to fulfill their ecclesial responsibilities (cf. cc. 97–99). This capacity to perform juridical acts with full efficacy, when set forth in book VII, results in the adequate subjective aptitude to perform procedural acts with full efficacy. The *CIC* makes no statement as to when the Christian faithful have that procedural capacity. Therefore, the basic provisions of the corresponding canons of book I, title VI must be followed. Nevertheless, it does make some specific provisions regarding the procedural capacity of natural persons in c. 1478. Moreover, on some occasions, the *CIC* uses the terms "persona standi in iudicio" to mean "procedural capacity." The latter is the official translation into Spanish that has been given and approved with respect to these Latin terms, as well as that of "capacity to act in a trial" (cf. cc. 1505 § 2,2° and 1620,5°).

Up until now, mention has been made of the Christian faithful, the baptized, the subject of the canonical code and, as a person in the Church, a recipient of ecclesiastical laws. However, c. 1476, for the exercise of actions (cf. c. 1491) and the defense of one's rights (cf. c. 221), grants non-baptized persons the power to personally , or through representation (cf. c. 1484 § 1), submit judicial complaints and defend themselves in a trial if sued. The procedural juridical status of non-baptized persons was changed as a result of Vatican Council II. Earlier, to appear at trial and have legal capacity, they had needed special authorization from the competent Sacred Congregation. After the last Ecumenical Council, the Pontifical Commission for the Interpretation of the Decrees of Vatican Council II acknowledged that generally non-baptized persons have the *ius accusandi* to obtain nullity of a marriage entered into canonically,[2] contrary to the previous practice and the specific provisions of *Provida Mater* 35 § 3. Because of c. 1476, the new *CIC* has eliminated from this procedural sphere all discriminatory barriers between baptized and non-baptized persons. Canonical justice is not reserved for those the canonical system considers persons in the Church. Therefore, the concepts of "person" and "personality" in procedural canon law exceed the strict limits of subjective consideration in this system and are established in the broadest sphere of human rights, which deserve to be recognized for all persons, without discrimination.

The juridical technique for explaining the arbitrated juridical solution can be none other than that designated as standing *ad processum*. Therefore, it is the determination of the canon law that grants juridical power in the system to someone who generally does not have it; or that juridical power to sue can be restricted by indicating who, among those who in principle have standing *ad causam*, can do so, excluding anyone else.

2. Cf. PCIDSVC, Resp. January 8, 1973, in *AAS* 65 (1973), p. 59.

In this way, the non-baptized may turn to the courts of justice of the Church in defense of their rights. This exercise and any other type of defense will be carried out because canon law grants a quality or procedural aptitude that authorizes one to be a "legitima persona standi in iudicio" even if he or she has not received baptism and does not constitute a person in the Church. This is regardless of whether or not a judgment can be pronounced after the process to his or her prejudice because one's standing *ad causam* has not been recognized; and also regardless of whether or not the person satisfies those conditions related to age and mental health. This allows the conclusion that whoever has juridical capacity *ad hoc*, also possesses legal capacity. If one did not meet the age or mental health requirements, the person would not thereby be prevented from exercising defense of his or her rights in the canonical procedural sphere, because if one has the juridical power to be a legitimate party to the process, there is nothing keeping him or her from using the provisions of c. 1478 for the purposes of compensating for or meeting the common demands related to lacking legal capacity lacking. One can also be represented in the process by a procurator or assisted by an advocate, whether they are designated by these parties voluntarily or ex officio if the judge or law deems it necessary (cf. cc. 1481–1484).

8. Lastly, the structural similarities of the process observed in part I of book VII of the *CIC*, as compared to the first four chapters of section I of part I of book IV of the *CIC*/1917, should be noted. Except for incidental differences, the similarities are notable with regard to norms on the competence, organization, and discipline of the tribunals, norms related to the parties and their procedural postulation, as well as with regard to the concept held regarding actions and exceptions. Nevertheless, there are innovations of some importance:

a) the appointment of lay judges, in case of a need and with the authorization of the bishops' conference, to make up the collegiate tribunal (cf. c. 1421 § 2);

b) the option of establishing tribunals of first and second instance for more than one diocese[3] with the approval of the Apostolic See, as well as tribunals of second instance established, with said approval, by the bishops' conference (cf. cc. 1423, 1439);

c) the broad ex officio initiative introduced by c. 1452;

d) the innovation involved for the postulation in the canonical process with the permanent legal representatives of the cause, for the exercise of some functions of the procurator and the advocate, the fees of whom will be received from the same tribunal (cf. c. 1490);

3. Article 105 of *REU* was their precedent.

e) the simplification achieved in the drafting and number of canons discussing actions and exceptions. The *CIC* developed them in cc. 1491–1500, and the *CIC*/1917 dedicated cc. 1667–1705 to them. However, the difference is more apparent than real; they are the same concepts of action, exception, counteraction, and cumulation of actions. The heart of the process remains with respect to the same juridical doctrine, except for merely minor incidental differences. The inclusion of c. 1494 § 1 on the connection of causes as one more reason for the counteraction, can be more important because of its newness.

Nonetheless, precautionary actions are retained in the new *CIC*; but not so other actions, perhaps because they are already contemplated in canons of other books, as occurs with the action for nullity of juridical acts and contracts, as seen in cc. 124, 125 § 1 and partially c. 126; with rescissory actions because it is found in cc. 125 § 2 and 126; full reinstatement has been correctly dispensed with, thereby avoiding confusion with the full reinstatement recourse of cc. 1645–1648; with respect to possessory actions, in c. 1500, a general reference is made to compliance with the civil law norms of the respective place. With respect to the extinction of actions because these extinctive phenomena are also separated in other areas of the *CIC*, as occurs with the provisions of cc. 197–199, or for actions resulting from crimes, as provided in cc. 1362 and 1363.

There is also a new action of interest introduced in the new *CIC*, namely reparation for damages described in c. 128, apart from other isolated actions, which arise from time to time among the details of the *CIC*. For example, one may refer to cc. 1281 § 3, 1289 and 1296, related to the administration and transfer of ecclesiastical goods.

1400 **§ 1. Obiectum iudicii sunt:**

1° personarum physicarum vel iuridicarum iura persequenda aut vindicanda, vel facta iuridica declaranda;

2° delicta, quod spectat ad poenam irrogandam vel declarandam.

§ 2. Attamen controversiae ortae ex actu potestatis administrativae deferri possunt solummodo ad Superiorem vel ad tribunal administrativum.

§ 1. The objects of a trial are:

1° to pursue or vindicate the rights of physical or juridical persons, or to declare juridical facts;

2° to impose or to declare penalties in regard to offences.

§ 2. Disputes arising from an act of administrative power, however, can be referred only to the Superior or to an administrative tribunal.

SOURCES: § 1: c. 1552 § 2
§ 2: c. 1601; CodCom Resp., 22 maii 1923 (*AAS* 16 [1924] 251); *REU* 106

CROSS-REFERENCES: cc. 1504,1°, 1501, 1607, 1611,1° et 2°, 1311, 1720, 1721, 1430, 1723, 1725, 1727 § 1, 1728 § 2, 1729 § 1, 1653, 1654 § 2, 1651, 1652, 1439 § 3, 1502, 1513, 1514, 1713, 1445 § 2.

COMMENTARY

Carmelo de Diego-Lora

1. *Obiectum iudicii* (§ 1)

a) *Obiectum iudicii sunt.* These words start the first canon in book VII. There is no attempt to define the object of the trial but only to indicate those objects the opinion will discuss, which must be issued by the organ in the Church that is to exercise the *potestas iudiciali.*

Among the definitions recognized for the term "object" in the Dictionary of the Spanish Academy, the use made thereof by the *CIC* corresponds to the definition that describes it as "material" of a science. In this case, it would be the theoretical-practical knowledge acquired as a consequence of a human activity, of a procedural nature, performed by and before a subject, organ of the judicial organization. This object corresponds

to the *quid petatur*, set forth in c. 1504,1° as a necessary element among the requirements of the petition: "what is being requested" is the translation in the official Spanish language version. It is a juridical matter submitted to the process, formally configured by the subject seeking to have the organ issue its opinion through procedural means, between given parties, according to an account of the facts that must be proven. What is being asked of the judicial organ is not to achieve an effect derived from a pure act of will intended simply to receive an expressly-desired result. What is being asked must have the legal support according to the proven facts, whereby this juridical basis affects the same formulation of what is to be requested. Therefore, asking for something in justice means that one can only ask for what in law, and pursuant to law, one can classify *a priori* as legitimate.

Garcia Failde[1] transfers this thesis to the elements constituting the action, among which he takes into account two elements he describes as *objective*: "the thing requested" and the "juridical cause of action" or "juridical reason." Viewing the same issue from the perspective of the object of the process, this object must be contemplated not only as reduced to its own formal expression, but also as a result of the exercise of the action, in which the reason or juridical basis, together with the factual hypothesis, becomes a request, *quid petatur.* Therefore, every request that is the object of the trial includes what is being requested as well as the reason or juridical cause of action, this latter determining what is formally requested. The object of the trial and reason for the request are fused in such a way that one lacks its *raison d'être* without its juridical foundation, and the other would lack all practical significance, without the possibility of becoming the object of the trial, if this juridical reasoning is not expressed in the *quid petatur.* To try to separate them, when issuing the opinion, would lead to incongruity of the judgment and convert the process into a dispute dominated by a dialogue between persons who speak mutually unintelligible languages.

In contrast to c. 1552 § 1 of the *CIC*/1917, the *CIC* has dispensed with issuing a definition of the ecclesiastical trial, instead choosing to describe the objects of the trial. Canon 1400 § 1 describes these objects in nos. 1° and 2°. It has dispensed with describing those of the first group as belonging to the contentious trial, and those of the second as characteristic of the trial that the *CIC*/1917 called criminal. This is a sensible innovation because every trial involves a contention, a feature that also characterizes the penal process. The penal process, which cannot be included in the extra-judicial option of c. 1720, is always contentious, as is evidenced by the provisions of cc. 1721, 1723 and 1725.

1. Cf. J.J. GARCÍA FAÍLDE, *Nuevo Derecho procesal canónico* (Salamanca 1984), p. 22.

According to the list of elements in c. 1400 § 1,1°, the object of the trial is all claims, including *acknowledgments, juridical constitutions, or the imposition of penalties on others* for them to give something, do, or refrain from doing some conduct, referring to rights and subjects subject to the canonical system. The precept also includes *declarations that can be diversified into purely declarative statements*, which can deal with *constitutions of new facts* that deserve to be justly created; or *constituting extinctions and modifications of factual situations* that need the judicial declaration contained in the judgments for them to occur and be taken into account and respected by all the subjects in the system, and observed by those obligated to comply. They spring from these aspirations contained in the party's claim, without which neither the process nor the opinion of the judicial organ of the Church can be conceived (cf. cc. 1501 and 1611,1° and 2°), in order that *any definitive judgments* (cf. c. 1607) pronounced at the end of the process *may be classified as merely declarative, constitutive, or impositional*, depending on their pronouncements, which need to be proven to be congruent with what the *CIC* designates *quid petatur.*

b) Canon 1400 § 1,2° includes a new object of the trial, not provided in no. 1°, by *also* considering *offenses* susceptible to being judged by the organs of justice of the Church for the imposition of canonical penalties. Just as no. 1° refers only to the rights of natural or juridical persons and to declarations of juridical facts, the *ius puniendi* has only the Church itself as its subject for its exercise (cf. c. 1311). Although the Church can act through administrative channels for this purpose, the ordinary can also decide that the judicial process must be initiated to judge the offense through the contentious process. The object of the process will be formalized by the promoter of justice, upon whom devolves the exercise of the functions of the ministry of the Church in charge of the defense of the public good, the nature of which is always shared by penal causes (cf. cc. 1721, 1430). Therefore, the Church will exercise the *ius puniendi* by way of a procedural action using a public office in order that the hierarchy issue an opinion using the competent judicial organ, which will maintain its independence in the contentious process to provide justice not influenced by the total weight of the *ius puniendi* that the Church has, but balanced between the initiative of the procedural action, in protection of that *ius*, exercised by the promoter of justice, and the right of the accused to defend themselves against the penal accusation through a defense technically organized according to law (cf. cc. 1723, 1725, 1727 § 1 and 1728 § 2).

If, as a consequence of the offense, some natural or juridical person should suffer damage or loss, to seek to have the judicial organ order reparation for that injury is a right recognized as deserving protection in favor of the individual or juridical person. Therefore, it is possible for this person to exercise his or her action cumulatively to the penal process itself. Nevertheless, c. 1729 § 1 does not give that person standing for the exercise of the penal accusation, reserved for the promoter of justice, the

sole party with procedural standing on behalf of the Church for the exercise of the procedural action derived from the *ius puniendi*, before the tribunals of justice of the Church.

Canon 1400 refers exclusively to the object of judicial recognition, the formal expression of which is issued though the definitive judgment. It does not refer to the object of the trial that must be judged in the process of execution. Cabreros de Anta noted this in his commentary on c. 1552 *CIC*/1917.[2] It is understandable, because even if the execution of the judgment, as occurred in the *CIC*/1917, is regulated within the current book VII, the executor is *par excellence* the diocesan bishop (cf. c. 1653). Only when he is certain that the judgment is null or patently unjust will he fail to execute it and refer the proceedings back to the tribunal that pronounced the judgment (cf. c. 1654 § 2). Strictly speaking, the act of execution takes place in the sphere of administrative power, once the judge has decreed that a judgment is executable (cf. c. 1651). However, it is unlikely that there are any scientifically pure juridical systems. Therefore, it is not strange that, in addition to the aforementioned hypothesis of c. 1654 § 2, there are two exceptions concerning remand to the competent judicial authority. One is c. 1652, required by the need for an incidental pronouncement issued regarding a statement of accounts before the execution in the strict sense. Another is required by another need and can be filed not only at the instance of a party, but ex officio, namely the case of negligence or a refusal to execute on the part of the one who must carry it out (cf. c. 1653 § 2 in connection with c. 1439 § 3).

2. *Controversies stemming from an administrative act* (§ 2)

a) The provision of § 2 of c. 1401 has no precedent in the *CIC*/1917. The consultors discussed the innovation at length at the session of April 4, 1978.[3] In the end, the wording set forth in the canon prevailed, with a slight variation that does not affect the meaning. The opposition to its inclusion arose from the fact that, in recourses to the administrative tribunal, there was no *actio iudicialis*. In fact, if c. 1400 § 2 only refers to recourses taken to the superior or the administrative tribunal against acts of administrative power, there is no judicial action or *obiectum iudicii*, to consider that it could be included in c. 1400. Nonetheless, the word *controversiae* used in c. 1401 is foreign to the administrative recourse, in which there should only be a vertical relationship between the subject of the system and the hierarchical superior (cf. cc. 1737–1739), not a confrontation between parties before the judicial organ characterizing the dispute.

2. Cf. M. CABREROS DE ANTA, commentary on c. 1552, in *Código de Derecho Canónico y Legislación complementaria* (Madrid 1974), p. 602.
3. Cf. *Comm.* 10 (1978), p. 217–218.

In this case, the only reason that could justify the norm's inclusion would be its utility. This canon would synthetically reflect the same ordering of book VII that, in its part V, presented the procedures for administrative recourses and for removing and transferring parish priests, both lacking a procedural nature. In them, any decisions made deal with a type of object that only corresponds by analogy to the *obiectum iudicii* contemplated in c. 1400 § 1.

b) It would be another matter if c. 1400 § 2 could be understood as including that which *becomes judicial* and complete, through the contentious-administrative recourse before the Second Section of the Signatura, introduced in canonical legislation in 1967 by *REU*, and set forth in c. 1445 § 2 and *Pastor Bonus* 123. According to the *SNAS*, the opinion that the judges of the Signatura must formulate is conceived as the pronouncement which finalizes the adversarial procedural activity, the object of the Signatura's recognition, and opinion, which includes, as stated in Art. 122 § 1, "omnia proposita petita et respectivas exceptiones." Then, it could be believed that the allusion to the administrative tribunal in c. 1400 § 2 refers to this special recourse, in which there is a dispute, albeit generated by the procedural challenge of an act of administrative power. This challenge will be exercised because of a judicial action based on a supposed prejudice in violation of the law.

Labandeira has offered new reasons supporting the broader possibility of judicially submitting to law the government function in the Church, albeit within certain limits.[4] He noted, citing Directive Principle no. 7, that the Code Commission had foreseen the constitution of other administrative tribunals in addition to the Signatura. He added, "Nevertheless, the institution of the lower tribunals was not considered appropriate and was deleted from the text of the 1983 Code at the last minute."[5] This is what Herranz[6] explains, indicating first the objections made regarding the plan to establish administrative tribunals distinct and hierarchically lower than the Signatura. Then, he explains its inclusion in the full *schema* of the *CIC* submitted to discussion in the plenary session of October 1981. At this session, it was decided that the establishment of these tribunals would remain optional, pending the decision of the competent bishops' conference. Thus, it was in the *schema novissimum* of March 25, 1981. However, when this point was considered by the experts appointed for this purpose, and by the three Cardinals and the two bishops who assisted the Holy Father in the drafting of the *schema*, these tribunals were eliminated.

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4. Cf. E. LABANDEIRA, *Tratado de Derecho administrativo canónico*, 2nd ed. (Pamplona 1993), pp. 461–466.
5. Ibid., p. 486.
6. Cf. J. HERRANZ, "La giustizia amministrativa nella Chiesa: dal Concilio Vaticano II al Codice de 1983," in *La giustizia amministrativa nella Chiesa* (Vatican City 1991), pp. 21–22.

It can be concluded that if the object of the trial can now be, pursuant to § 2, any disputes arising from acts of the administrative power before the Signatura, the reference to referral *ad tribunal administrativum* leaves open the possibility of creating other administrative tribunals that can decide disputes arising from challenges to acts of administrative power. The reference in c. 1445 § 2 to the lawfulness of lodging this type of challenge suggests the idea of a right to action by the one challenging the act and that, as now occurs with the contentious-administrative recourse before the Signatura (cf. *PB* 123 §§ 1 and 2), it must be supported on the violation of law and on the prejudice suffered as a consequence, if any.[7]

7. E. LABANDEIRA, *Tratado de Derecho administrativo*, cit., pp. 497–502.

1401 Ecclesia iure proprio et exclusivo cognoscit:

1° de causis quae respiciunt res spirituales et spiritualibus adnexas;

2° de violatione legum ecclesiasticarum deque omnibus in quibus inest ratio peccati, quod attinet ad culpae definitionem et poenarum ecclesiasticarum irrogationem.

The Church has its own and exclusive right to judge:

1° cases that refer to matters which are spiritual or linked with the spiritual;

2° the violation of ecclesiastical laws and whatever contains an element of sin, to determine guilt and impose ecclesiastical penalties.

SOURCES: c. 1553 § 1,1° et 2°; SCCouncil Resol., 11 dec. 1920 (*AAS* 13 [1921] 262–268)

CROSS-REFERENCES: cc. 130, 135ff, 1272, 1400, 1415

COMMENTARY

Carmelo de Diego-Lora

1. While c. 1400 has been reproduced by c. 1505 *CCEO*, once the *obiectum iudicii* has been specified, the *CCEO* avoids determining which juridical contents are judged by the Church by its own and exclusive right. This change in the mind of the canonical legislator from one code to the other still has arguments that favor the criterion followed by the Code for Eastern Churches.

When discussing c. 2 of the first *schema* of the *CIC*, the *Coetus studiorum de processibus*[1] noted that there were underlying problems of some importance in c. 1553 § 1 *CIC*/1917. In fact, in c. 2 of the *schema*, the juridical material contemplated had been reduced to matters affected by the privilege of the forum and those of mixed forum. Some consultors felt that the content of the draft canon could not be admitted without conflict, given current Church-state relationships. However, the solution that was offered posed new problems. At that same session of the *Coetus*, a question arose regarding the determination of the scope the Church had in issuing opinions in the exercise of the *potestas iudicalis*. This led to the

1. Cf. *Comm.* 10 (1978), p. 218.

proposal of reproducing only the text of c. 1553 § 1 *CIC*/1917, except no. 3°, related to the former forum privilege. This opinion was adopted in c. 1401, even though at that time the reporter noted that said scope, determining the juridical material on which the Church has its own and exclusive right to judge, should be described in what would be the *LEF*.

In fact, the *schema "Legis Ecclesiae Fundamentalis,"*[2] although it lacked a general description of matters over which the Church exercises its power of governance, in its c. 79 described the sphere over which the Church was believed to exercise judicial power: "the request or claim of all the rights of the faithful in the Church and of all juridical persons recognized therein. Pursuant to the sacred canons, its competence also includes hearing violations of ecclesiastical laws, especially ecclesiastical offenses, for the purpose of imposing or declaring the sanctions established in law."[3] Moreover, its c. 75 § 2 contained a general norm affecting the spiritual governance of the faithful, declaring that the Church "is vested with all power ... namely, legislative power, executive power, and judicial power; those who hold this power use it only to edify the people of God in truth and holiness."[4] Clearly, this canon articulated not only the concrete juridical matters over which the Church exercises its power but the *munera* of those who exercise that power and the objectives to be achieved by its exercise.

In book I of the new *CIC*, there is no general norm describing the sphere of diverse juridical matters over which the Church exercises its proper and exclusive power. Moreover, cc. 135 *et seq.* regulate only the modes of exercise of powers in the Church.

The Church, through its legislative, executive, and judicial powers, acts with binding authority with respect to its faithful, in the very area of the various political communities, each with its own temporal powers, and with certain manifestations of exclusivity over its own subjects, whom it tries to protect from other primary juridical systems. Therefore, it should not seem surprising that history repeatedly notes the existence of conflicts between both powers, ecclesiastical and civil.[5]

It cannot be argued that no matters may arise in the future that could be classified as having a judicially mixed forum. The *CIC*, in c. 1401, has completely dispensed with the jurisdictional call based on its forum privilege. Additionally, neither this canon nor those that follow refer to mixed forum causes, unlike the provisions of cc. 1553 § 2 and 1554 *CIC*/1917. If the *CIC* mentions the precautionary forum, it is to place it strictly within

2. Cf. REDACCIÓN IUS CANONICUM, *El proyecto de Ley Fundamental de la Iglesia. Texto bilingüe y análisis crítico* (Pamplona 1971), pp. 25–59.

3. Ibid., p. 52.

4. Ibid.

5. Cf. my article in this regard: "Ámbito de las Jurisdicciones eclesiástica y civil, in el Concordato español de 1953," in *Ius Canonicum* 3 (1963), pp. 507–677.

the canonical sphere, without communication with the civil forum, for the case in which multiple ecclesiastical tribunals can be considered equally competent over the same object of the trial (cf. c. 1415).

2. This position may reveal a clear effect of the Apostolic Constitution of John Paul II, of January 25, 1993, *Sacrae disciplinae leges,* an expression of the desire to have this new *CIC* be congruent with the teaching of Vatican II. In fact, *Gaudium et spes* 36 sets forth the doctrine of the autonomy of the temporal, as a reality dependent on God, who has created earthly things with their own consistency, truth, goodness and order that man must respect.

Gaudium et spes 76 proceeded to recognize the independence and autonomy of the political community and the Church community. Both must maintain cooperative relationships, taking into account local and temporal circumstances. If the temporal and supernatural realities are closely linked, with the Church using temporal means to fulfill its own mission, it nonetheless, according to said Constitution, does not place its hopes on privileges offered by the civil power: "immo quorundam iurium legitime acquisitorum exercitio renuntiabit" when its use can cast doubt on the sincerity of its testimony or such a renouncement may be demanded by new living conditions.

In this context, it is understandable why c. 1401 has dispensed with any reference to the forum privilege, which results in an implicit waiver by the Church of this secular privilege. However, by not mentioning causes with a mixed forum (the existence of which results from a conflict between two jurisdictions considered equally competent to hear a given issue that becomes litigation) that waiver of power is not possible, since it may prejudice one of the faithful, a proper subject of the Church. Perhaps the Church has dispensed with regulating these issues because it hopes they will not occur in the future, since the legislative discipline of the Church must be freed of secularist adherence, which arises so often in these conflicts. Moreover, these inter-jurisdictional conflicts between the Church and other political communities belong to a sphere of external public law, and as set forth in the *Preface* of the *CIC,* in a session in April of 1968, it was unanimously decided by the group dedicated to studying the systematic order, "not to include in the new Code ... public law norms outside of the Church."[6] Finally, since the *CIC* is called to regulate the life of the Church in the midst of an intensely secularized society, the new living conditions recognized by Vatican Council II have been able to bring about a renunciation of legislation on a subject which would be exceptional and difficult to pose procedurally if the Church and the political community develop their relations in a system of separation as well as, if on the other hand, there is a system of concurring relations between them,

6. The cited text is taken from the *Pamplona Com,* p. 59.

because in this case it will be the international agreement that governs the legislative area in which there must be a solution to hypothetical conflicts of mixed forums.

In any event, although the independence and autonomy of the Church and the political community are affirmed, the temporal and supernatural realities are closely united; and because of this, the viability of a conflict cannot be renounced a priori by the Church, as can be done in the case of a privilege. Canon 1401,1° does not prevent one from contemplating, at least from a distance, a time of potential conflict between ecclesiastical and civil jurisdictions.

3. According to the canon, the Church has an exclusive right to judge the following matters:

a) "Cases which refer to matters which are spiritual or linked with the spiritual" (1°). These words describe an area of exclusive competence of the Church, in which one hopes not to find areas of convergence with juridical matters in which the State may claim its own competency. Nevertheless, in cases linked to the spiritual, especially matters of a patrimonial nature, there will be conflictive situations.

Roberti,[7] when enumerating the *res* he believes to be included as litigious in the category of spiritual causes, mentions those referring to faith and morals, the sacraments (especially marriage), sacramentals, indulgences, worship and sacred rites, vows, oaths, ecclesiastical public power, sacred offices, and the juridical status of clergy, religious and ecclesiastical moral persons, exemptions, etc.

Concerning causes linked to the spiritual, he mentions the right of patronage, the ecclesiastical benefice, tithes, ecclesiastical burial and similar matters. Given that many of these phenomena belong to the past, it could be said that a large portion of the juridical treatment of ecclesiastical patrimony would lie in situations originating in related matters, which would require an act of discernment so that, if a conflict arises between juridical persons of the Church, jurisdiction is not removed from the Church.

A mixed issue that could occur often refers to declaring the nullity of a marriage between non-Catholics when one of them seeks to marry a Catholic. It does not seem to be covered under c. 1400,1°, as a cause linked to the spiritual. The Signatura, in response to an inquiry on May 28, 1993, pronounced a *Declaratio* affirming the Church's jurisdiction to judge these cases[8] (see commentary on c. 1674).

7. Cf. F. ROBERTI, *De Processibus*, I (Rome 1956), pp. 128–129.

8. Cf. R. RODRÍGUEZ-OCAÑA, "Notas al Decreto del Signatura: la jurisdicción eclesiástica y los matrimonios de los acatólicos," in *Ius Canonicum* 34 (1994), pp. 653–659.

b) "The violation of ecclesiastical laws and whatever contains an element of sin, to determine guilt and impose ecclesiastical penalties" (2°). This norm reveals that c. 1401 exceeds the limits of book VII and should be located, in the absence of *LEF*, in the general section of the *CIC*.

A violation of ecclesiastical laws, whether due to culpable noncompliance or direct transgression, would be judged in the ecclesiastical forum where those laws were promulgated and went into effect, regardless of their particular recipients. It includes matters belonging to the internal forum, not only to be handled through the sacrament of penance, but also when their effects transcend the external forum and require the intervention of those possessing the power of governance (cf. c. 130). In this field of juridical activity, one can find activities of the internal forum or of the external forum reserved to the Apostolic Penitentiary (cf. *PB* 117) or the Congregation for the Doctrine of Faith (cf. *PB* 52). In general, they will be the tribunals of justice called to definitively judge violations of ecclesiastical law and all those acts that transcend in their commission and effects the external forum and are liable to become *judicial res*. For example, it is sufficient to refer to part II of book VI, which defines those offenses that are appropriate for the trial of the judicial power of the Church, regardless of any decision that can be reached on the same act in the internal forum of the conscience and the sacramental.

1402 **Omnia Ecclesiae tribunalia reguntur canonibus qui sequuntur, salvis normis tribunalium Apostolicae Sedis.**

All tribunals of the Church are governed by the canons that follow, without prejudice to the norms of the tribunals of the Apostolic See.

SOURCES: c. 1555 §§ 1 et 2; *REU* 108, 110

CROSS REFERENCES: cc. 1, 4, 12 § 1, 13 § 1, 17–19, 87 § 1, 360, 1443–1445, 1439, 1442, 1500, 1509, 1602 § 3, 1649, 1650–1652, 1653 § 1, 1670, 1714, 1716 § 2

COMMENTARY

Carmelo de Diego-Lora

1. The norm contained in this canon corresponds to the provisions of c. 1555 *CIC*/1917, although the new wording dispenses with all references to the current CDF, which must follow the norms pronounced by the Congregation itself. In its first session, the consultors of the Code Commission decided that it would be preferable for this issue to be regulated in the chapter on the Roman Curia.[1] Nonetheless, the current *CIC* provides very little regulation for the Roman Curia; the only thing c. 360 does is refer to the particular law of its various organs. *Pastor Bonus* 52 and 53 provide that it devolves upon the CDF to judge offenses against the faith, the more grave offenses committed against morality and the celebration of the sacraments, and what concerns the *privilegium fidei*.

Roberti[2] classified the activity of the then Sacred Congregation of the Holy Office as the special tribunal of justice, as opposed to the ordinary tribunals. If, when it is a matter of the documents and opinions on the faith and customs, Art. 51 of *Pastor Bonus* uses the term *examination* by the Congregation; Arts. 52 and 53, on the other hand, use the verb *to judge*. It is not that there is no trial in cases related to doctrine. However, it is not juridical but "of a theological nature exercised by virtue of the *munus docendi* of the ecclesiastical teaching. It is not a trial according to the criteria of the ecclesiastical juridical order. With it, one is not seeking to decide on the *justum*, but on the theological truth as professed by the Teaching ... Nor

1. Cf. *Comm.* 10 (1978), p. 219.
2. Cf. F. ROBERTI, *De Processibus*, I (Rome 1956), pp. 391–403.

does the organ that decides it have any reason to enjoy juridical aptitude, but theological aptitude; nor can the *ratio* be used to formulate the judgment that must meet the juridical criteria of reason, but the theological criteria. Nor is the science that must serve as a reference, for the comparison of the doctrine examined, a juridical science, but the theological science."[3] This does not occur in cases treated in Arts. 52 and 53 of *Pastor Bonus*, in which the Congregation acts as a tribunal to judge a specific situation subsumed in the legislative norm, or as an administrative organ. Therefore, it acts in the first situation as a tribunal of justice of the Apostolic See, subject to its particular law, not the general provision of c. 1402.

In the second place, the reference of c. 1555 § 3 *CIC*/1917 is dispensed with for resignation by religious, which is regulated according to the proceedings established in cc. 654–668 *CIC*/1917. This judicial process was derogated by the Decree of the Sacred Congregation on March 2, 1974, which determined that the expulsion of a religious in an exempt clerical community would be governed by the administrative procedure established for the remaining religious with perpetual vows. Presently, eleven canons of the *CIC* (cc. 694–704) regulate the various procedures for dismissal, but the difference between them is not due to the nature of the vows given or the community in which they are given, but "a function of the various causes motivating the expulsion and not with regard to the juridical status of the religious."[4] The three new procedures are of an administrative nature, and the decree of dismissal issued by the superior with his tribunal, requires the confirmation of the Holy See or of the diocesan bishop for efficacy, depending on the nature of the institute. Therefore, with the new Code, a norm like that of c. 1555 § 3 *CIC*/1917 has become unnecessary.

3. In fact, the new canon sets forth only the former norm of c. 1555 § 2, albeit formulating a general legal attribution—"all tribunals of the Church are governed by the canons which follow"—then adding an exclusion: "without prejudice to the norms of the tribunals of the Apostolic See."

a) The words *omnia Ecclesiae tribunalia* must be understood limited to the Latin Church (cf. c. 1), since the *CCEO* discusses procedural norms in tit. XXIV–XXVIII, of which only tit. XXVII, dedicated to juridical-material norms related to penal sanctions, should be excluded.

The positive mandate of the canon has a universal element. Wherever there is a judicial process within the scope of the Latin Church, the organization and discipline of the tribunals, as well as the requirements of the process, are subject to the same canonical norms. In fact, such a legislative pronouncement would not be necessary because, as provided in c. 12 § 1, universal laws, meaning the laws that apply in the Latin Church,

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3. C. DE DIEGO-LORA, "El examen de las doctrinas," in *Ius Canonicum* 14/28, (1974), pp. 160–161.

4. T. RINCÓN-PÉREZ, "Institutos de vida consagrada y Sociedades de vida apostólica," in *Manual de Derecho Canónico* (Pamplona 1991), p. 268.

are binding on everyone throughout the world for whom they are intended. In any event, this universal dimension is inherent in the *CIC*, except when its norms make express references to particular laws, which are presumed to be territorial and not personal, pursuant to c. 13 § 1.

Moreover, book VII of the *CIC* contains references to canonical peculiarities that can be regulated by particular law or lower-level norms of this type. Examples include c. 1439 (regarding the tribunals of first and second instance for more than one diocese, which will be established by the respective bishops' conferences with the approval of the Apostolic See) and c. 1716 § 2 (regarding the method for canonical challenges of arbitration awards motivated by the desire to maintain a parallelism with what is provided in this regard by the civil law of the territory). Nonetheless, c. 1649 offers particular procedural regulation for diocesan bishops in regard to judicial costs, legal aid, compensation for damages owed by a rash litigant and deposits to guarantee payment of those costs and possible payment of damages. Nevertheless, it could be said that these faculties come from the procedural canonical norm that allows, by exception, particular norms to be pronounced, the supporting bases of which is the universal law, within which limits the hierarchy established by those norms must act. However, this occurs in every norm referring to the particular law contained in every canon with a universal scope.

There are other normative phenomena in book VII containing references to particular law, as with the execution of judgments. Execution of judgments devolves upon the bishop, personally or through another, "nisi lex particularis aliud statuat." It could be considered a concession to the administrative power, upon which execution of the judgment is conferred and, since it not a judicial activity in the strict sense, c. 1653 § 1 avoids the universality set forth in c. 1402, which is what is properly judicial in the execution. On the other hand, what is regulated in cc. 1650–1652 is consistent with the provisions of c. 1402. It is a possible explanation, but there are contradictory manifestations between the wording of the canons.

Moreover, for the purposes of notification, there is a reference to particular law in c. 1509, which is surprising because it affects the procedural guarantee that summons, decrees, judgments and other procedural acts will be communicated to their recipients, on which usually depends on the adoption of defensive procedural positions for the parties to the process. Lastly, in c. 1602 § 3, concerning the length of the final written arguments, number of copies and other circumstances, there is an express reference to the regulations of the tribunal.

On the other hand, one can note in the sphere of judicial decisions, an area of discretion granted the judge or tribunal that may conflict with that universality, or *uniformity*, as Arroba Conde calls it,[5] proclaimed by

5. Cf. J.M. ARROBA CONDE, commentary on c. 1402, in *Código de Derecho Canónico* (Valencia 1933).

c. 1402 regarding the canons of the book that follows, and with the opinion (widely-held in doctrine[6]) that procedural norms, in that they concern the public good, are not presumed to be dispositive, but rather belong to the *ius cogens*, and as such cannot be derogated except by the supreme legislator. However, in all other things related to procedure, c. 1670 allows the judge to derogate procedural norms in a reasoned decree if compliance therewith is not required for validity, for the sake of expediency. These measures, which must be taken without detriment to justice and by reasoned decree, can only be pronounced within the oral process, which is the context of c. 1670. This canon uses the verb *derogare*, which is not accurate.

Excluding the exceptional situations just indicated, and given that the *CIC* extends its efficacy to the entire Latin Church, the first phrase of c. 1402 is formulated with the express desire to stress the universal nature of procedural norms. In this way, the provisions of c. 12 § 1 are reinforced and a criterion with interpretative certainty is introduced into the *CIC*, which adds to what was provided in cc. 17–19 regarding the interpretation of ecclesiastical law. Therefore, if any doubt arises as to the efficacy of a particular procedural norm, if it is not expressly provided by the *CIC*, the doubt should be resolved in favor of the universality of the procedural norm contained in the *CIC*. This universal relevancy of the procedural code legislation is consistent with the exclusion set forth in *Christus Dominus* 8 and included in c. 87 § 1: procedural laws cannot be excused by the diocesan bishop.

b) The negative aspect of the canon excludes the norms of the tribunals of the Apostolic See from that universality of the procedural norms of the *CIC*. These tribunals, like other organs of the Roman Curia, are subject to the provisions of their particular law concerning the *constitutio et competentia*. The canon does not refer to procedural norms, which could be subject to that dimension of universality proclaimed by c. 1402 in its first clause; nevertheless, the particular nature of its procedures has been preferred.

The apostolic tribunals, are, according to the list in *Pastor Bonus*, IV, the Apostolic Penitentiary (AP), the Supreme Tribunal of the Apostolic Signature (Signatura), and the Tribunal of the Roman Rota (TRR). However, for the *CIC*, the two latter tribunals are the ordinary tribunals of justice (c. 1442). The fact that book VII does not refer to the AP is explained by *Pastor Bonus* 118: its jurisdiction affects only the internal forum. The competencies assigned to this tribunal in *Pastor Bonus* 119 and 120 are separate from any activity that could be compared to the recognition and judicial sanction of the subjective rights and legitimate interests duly protected through the definitive judgment pronounced in the judicial process.

6. Cf. F. ROBERTI, *De processibus*, cit., pp. 91–92.

Therefore, the Signatura and the TRR are excluded from the universality of the norms of book VII. Nevertheless, the canons of *Liber* VII govern them to the extent that cc. 1443–1445 treat these tribunals. Then, it would have to be said that particular norms are provided for ordinary tribunals whose respective competencies reach the entire Catholic world. From this point of view, it could be said that its procedural norms have a universal dimension with even more breadth than that proclaimed by c. 1402, since c. 1065 *CCEO* provides that the tribunal of the third grade is the apostolic See. Art. 58 § 2 *Pastor Bonus* concludes by setting forth the legislative principle that, in the Eastern Churches, the specific and exclusive competency of the Signatura and the TRR remain intact (despite the competencies that are attributed in § 1 to the CEC). If the canonical procedural norm tends to have a universal scope with c. 1402, except for the Eastern Churches, the norms particularly established for certain tribunals of justice of the Church acquire universality through their very nature: the universal character of the ordinary tribunals for whom those special procedural norms are intended.

The *CIC* does not discuss the organization of the Apostolic See, its procedures, the possible challenges to its judicial resolutions, nor their effects. It only describes the competencies of the two tribunals. Moreover, *Pastor Bonus*, Arts. 121–124 and 126–129 address those diverse competencies, although Art. 123 §§ 1 and 2 introduces a procedural norm and notes, for the Signatura, a new *obiectum iudicii* not set forth in the *CIC*. Art. 126 provides new functions that are not attributed in the *CIC* to the TRR, and Art. 127 establishes directive norms for the selection of Rota judges, and a very specific one for the appointment of its deacon (apart from the express consideration that this tribunal constitutes a *collegium*). However, for one tribunal as well as for the other, arts. 125 and 130 respectively provide that they are governed by their own law.[7]

This is not the proper place to describe the organization and governance of the tribunals of the Apostolic See (see commentaries to cc. 1442–1445). For provisional information, it is sufficient to refer to their recent works.[8]

Lastly, one must mention other current procedural norms, although they are territorial and not universal (cf. c. 13 § 1), in that they derive from a papal privilege given to a certain nation with the particular character of being specific norms of a specific Rota tribunal the competence of which, as an ordinary tribunal, covers the entire territory of the Spanish nation. It is the tribunal of the Rota of the Spanish Nunciature. As a tribunal established through a privilege granted by the Apostolic See, it retains all the

7. Cf. the new *NSRR*, April 18, 1994, in *AAS* 86 (1994), pp. 508–540.

8. Cf. C. DE DIEGO-LORA, "Los Tribunales de Justicia de la Sede Apostólica, I: La Rota Romana, and II: La Signatura Apostolica," in *Ius Ecclesiae* 4 (1992), pp. 419–461, and 5 (1993), pp. 121–158, *respectively*.

force granted by c. 4 *CIC*. This privilege, although it originated from the Breve *Administrandae iustitiae zelus*, of Clement XIV, of March 26, 1771, after various changes undergone throughout history, it was reestablished by the *Motu proprio* of Pius XII, of April 7, 1947, *Apostolico Hispaniarum Nuntio*.[9] At present, it is governed by the *Motu proprio* of John Paul II, *Nuntiaturae Apostolicae in Hispania* of October 2, 1999. Its articles contain norms for the constitution and running of the competent tribunal, for advocates, procurators and judicial procedure.[10]

In conclusion, the exclusion in the canon expressly refers to the tribunals of the Apostolic See, Signatura and TRR, but also covers the CDF when it acts as a tribunal of justice, especially in the phenomena of Art. 52 of *Pastor Bonus*, and lastly, due to privilege, the Rota tribunal of the Apostolic Nunciature in Spain.

In any event, in every process handled in a Church tribunal of justice, the canonical procedural system as a whole underlies it. This system is not the effect of mere regulations fully adapted to the regulated object in order to offer proper solutions. There are procedural concepts in the *CIC* that belong to the procedural system itself and can be applied to every process handled. The concepts of jurisdiction and competence belong to the entire canonical procedural system. Moreover, it is in book VII of the *CIC* where this system is found most completely. Therefore, the exclusion made by c. 1402 of the norms in book VII is compatible with the idea that those norms are also latent in those excluded tribunals but subject to a regulation that is continuously fed by the procedural system set forth in the canons of book VII.

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9. Cf. *AAS* 39 (1947), pp. 155–163; cf., for their knowledge and scholarship, M. CABREROS DE ANTA, in *Comentarios al Código de Derecho Canónico*, III (Madrid 1964), pp. 295–311; M. BONET, "El restablecimiento del Tribunal de la Rota de la Nunciatura Apostólica in España," in *Revista Española de Derecho Canónico* 2 (1947), pp. 496–563.

10. J. LLOBELL, *Le norme del 1999 della Rota della Nunziatura Apostolica in Spagna*, in *Ius Ecclesiae* 12 (2000), pp. 69-97.

1403 **§ 1. Causae canonizationis Servorum Dei reguntur peculiari lege pontificia.**

§ 2. Iisdem causis applicantur praeterea praescripta huius Codicis, quoties in eadem lege ad ius universale remissio fit vel de normis agitur quae, ex ipsa rei natura, easdem quoque causas afficiunt.

§ 1. Special pontifical law governs cases for the canonization of the Servants of God.

§ 2. The provisions of this Code are also applied to these cases whenever the special pontifical law remits an issue to the universal law, or whenever norms are involved which of their very nature apply also to these cases.

SOURCES: § 1: cc. 1999–2141; PAULUS PP. VI, m. p. *Sanctitas clarior*, 19 feb. 1969 (*AAS* 61 [1969] 149–153); PAULUS PP. VI, Ap. Const. *Sacra Rituum Congregatio*, 8 maii 1969 (*AAS* 61 [1969] 297–305); SACRA CONGREGATIO PRO CAUSIS SANCTORUM, Decr. *Ne ob diuturnum*, 3 apr. 1970 (*AAS* 62 [1970] 554–555); SACRA CONGREGATIO PRO CAUSIS SANCTORUM, *Notif.*, 16 dec. 1972

CROSS REFERENCES: —

COMMENTARY

José Luis Gutiérrez

I. CAUSES FOR CANONIZATION: NATURE AND NORMATIVE ASPECT

1. *Nature of causes for canonization*

A cause of canonization consists of the steps followed from the time a competent authority initiates an investigation of the saintliness of a Servant of God until that saintliness is proclaimed by the Pope.

Beatification and canonization are pontifical acts by which public worship honoring a Servant of God is authorized: Holy Mass, Liturgy of the Hours, display of the image with a halo or other signs of saintliness, veneration of relics, etc. Beatification grants that worship within a limited

sphere, while canonization allows worship throughout the Church, without any restriction as to place.[1]

This complex procedure takes place in the following phases:

a) the decision by the competent diocesan bishop, to initiate a cause;

b) the instruction phase, handled by the diocesan tribunal;

c) the sending of this material to Rome and its study by the *CCS* to determine with moral certainty whether there is (cf. c. 1608) a *degree of heroism* achieved by a Servant of God in the practice of the virtues, his or her *martyrdom*, or a *miracle* of God in response to his or her intercession.

When the opinion of the *CCS* is positive, it is presented to the Pope, upon whom it devolves to declare that a Servant of God has heroically exercised the virtues or died a martyr, or that God has performed a miracle because of his or her intercession. Likewise, the Pope decides whether it is appropriate to proceed to beatification or canonization.

Notwithstanding the placement of c. 1403 in book VII of the *CIC*, the object of a cause of canonization differs from what is characteristic of a trial (cf. c. 1400), since its promoters can only request the canonization of a Servant of God, not assert a right to it. Moreover, the ruling on the cause does not devolve upon the judges, since the rulings issued by them only have an informative value for the Pope, upon whom it devolves to make the decision. This shows that causes of canonization can be classified as processes only in a broad sense. Their merely investigative nature, prior to a pontifical act, make them similar to the procedure established for the granting of the dispensation of a ratified but non-consummated marriage (cf. cc. 1697–1706). This does not prevent the process for canonization from proceeding in a manner similar to that of a trial and, due to the weight of evidence required therein, from being compared by doctrine to a contentious trial and even a penal process.[2]

The fact that the promoters of a cause cannot assert a right to canonization does not mean that they do not enjoy a series of legitimate interests that, when applicable, they can assert in the manner provided by law against persons or entities that do not respect them: for example, against the diocesan bishop, who cannot arbitrarily refuse to accept a cause; against the tribunal in charge of the instruction phase, if it does not faithfully perform its functions; against the *CCS* if it does not act in accordance with the current norms, etc.

1. Cf. G. STANO, "Il rito della beatificazione da Alessandro VII ai nostri giorni," in *Miscellanea in occasione del IV Centenario della Congregazione per le Cause dei Santi* (1588–1988) (Vatican City 1988), pp. 367–422.

2. Cf. F. DE MATTA, "Novissimus de Sanctorum canonizatione tractatus" (Rome 1678), *pars* IV, ch. 15, nos. 10–25; BENEDICTUS XIV, *Opus de Servorum Dei Beatificatione et Beatorum Canonizatione* (Prati 1841), L. III, ch. 3, no. 2.

2. *Norms of the CIC/1917*

In the *CIC*/1917, the norms on the canonization process were in cc. 1999–2141, which provided for two phases. First, the informative process on the reputation for saintliness and the virtues or martyrdom of a Servant of God occurred, accompanied by the process to verify that undue worship was not being paid to him or her. Once that material was examined by the respective Roman Congregation (at that time called the Congregation of the Rites), the apostolic process on the virtues or the martyrdom in particular took place.

While the *CIC*/1917 was in force, two important innovations were introduced. In 1930, Pius XI simplified the method for handling causes based on historical documents, so that in these causes the apostolic process was no longer necessary.[3] In 1969, Paul VI combined the informative and apostolic process into one, called the cognition process.[4]

3. *Currently active juridical norm*

Canon 1403 § 1 provides that "cases for the canonization of the Servants of God are governed by special pontifical law." Canon 1057 *CCEO* expresses the same idea with similar words. Special pontifical law is now made up of:

a) The Apostolic Constitution *Divinus perfectionis magister*, promulgated by John Paul II on January 25, 1983. This Apostolic Constitution changed the procedure for the instruction of causes of canonization and gave a new structure to the SCCS.[5] *DPM* went into effect the day it was promulgated, and all the norms that were in force up to that point were abrogated.[6] This abrogation affected not only the provisions of the *CIC*/1917, but all the norms in force until then, without exception, and for the interpretation of *DPM*, it did not even provide the recourse of canonical tradition referred to in c. 6 § 2 for the canons of the *CIC*.

b) Two documents from the SCCS on February 7, 1983, the *Normae servandae in inquisitionibus ab Episcopis faciendis*[7] and the *Decretum generale de Servorum Dei Causis, quarum iudicium apud Sacram*

3. Pius XI, mp *Già da qualche tempo*, February 6, 1930, in *AAS* 22 (1930), pp. 87–88; SCRit, *Normae servandae in construendis processibus ordinariis super Causis historicis*, January 4, 1939, in *AAS* 31 (1939), pp. 174–175.

4. Paul VI, mp *Sanctitas clarior*, March 19, 1969, in *AAS* 61 (1969), pp. 149–153.

5. *AAS* 75 (1983), pp. 349–355.

6. N. 17 of the *DPM* establishes: "Quae Constitutione hac Nostra praescripsimus ab hoc ipso die vigere incipiunt." The end of the introductory section of *DPM* reads: "In posterum, igitur, abrogatis ad rem quod attinet omnibus legibus cuiusvis generis, has quae sequuntur statuimus normas servandas."

7. *AAS* 75 (1983), pp. 396–403.

Congregationem pendet,[8] the latter having transitional provisions on the method for continuing the study of causes that had begun to be heard pursuant to the norms previously in force.

The provisions of the general documents on the Roman Curia, specifically in *Pastor Bonus* (cf. especially arts. 71–74) and in the RGCR apply to the *CCS*.[9]

Moreover, by virtue of c. 1403 § 2, the provisions of the *CIC* apply to cases of canonization "whenever the special pontifical law remits an issue to the universal law or whenever norms are involved which of their very nature apply also to these cases." Therefore, the norms of the *CIC* apply to causes of canonization when the special pontifical law by which these causes are governed so provides, and when they are norms that, by their very nature, are also valid for causes of canonization, such as the norms on processes or procedure.[10]

For the economic administration of the goods of causes of canonization, the SCCS promulgated the norms now in force on August 20, 1983, not published in *AAS*.[11]

In the event that the current norm contains a lacuna, it is necessary to use the criteria provided in c. 19, among which, for causes of canonization, are jurisprudence and the practice followed by the *CCS* in resolving similar matters, as well as the indisputable authority enjoyed by the writings of Prospero Lambertini (Benedict XIV).[12]

II. DEVELOPMENT OF CAUSES FOR CANONIZATION

These causes are governed by special pontifical norms, of which, the Apostolic Constitution *DPM* and the *Normae servandae in inquisitionibus ab Episcopis faciendis* are of particular interest.[13]

8. *AAS* 75 (1983), pp. 403–404.

9. A. 1 §2 provided, moreover, that every dicastery must produce its own set of regulations.

10. Though not exhaustive, the appendix of R. RODRIGO gathers from *Liber* VII the most important canons regarding the process of canonization (R. RODRIGO, *Manual para instruir los procesos de canonización* (Salamanca 1988), pp. 249–289).

11. They can be consulted in X. OCHOA, *LE Ecclesiae post Codicem iuris canonici editae*, VI (Rome 1987), cols. 8666–8668.

12. Cf. BENEDICT XIV, *Opus de Servorum Dei Beatificatione et Beatorum Canonizatione* (Prati 1839–1842).

13. SCCS, *Normae servandae*..., cit., in note 7. For a general commentary on the prevailing standard regarding causes of canonization, cf. E. APECITI, "Le nuove norme per le cause di canonizzazione," in *La scuola cattolica* 119 (1991), pp. 250–278; A. CASIERI, *Postulatorum Vademecum*, 2nd ed. (Rome 1985); G. DALLA TORRE, "Processo canonico (processo di

The main idea inspiring the current norms, as described in *DPM*, is a desire to complete the provisions given by Pius XI and Paul VI so that, in the development of causes, the critical historical method would be increasingly taken into account. In addition, there was a wish to streamline causes, without detriment to the solidity of the investigation.[14] Finally, the norms were formulated to better reflect the participation of the diocesan bishop and the Holy See in each cause.

A. *Preliminary notions*

1. *Candidate*

This commentary will use the term "candidate" to designate the person whose canonization is being requested and who, once the cause is admitted by the diocesan bishop, will be called a "Servant of God." It is possible to propose a cause of canonization of a deceased Catholic who: *a)* is considered to have exercised to a heroic degree all the virtues; or *b)* is a martyr, violently killed due to hatred of the faith. Both types of causes can be *recent or old*, depending on whether the evidence is based on eyewitnesses or only on written sources.[15]

Based on the evidence gathered in the diocesan instruction phase, the question that must be answered by those who are to give their vote in the *CCS* is:

a) When it is a question of heroic virtues of a Servant of God: "If there is evidence of the theological virtues of Faith, Hope, and Charity towards God as well as towards one's neighbor, as well as the cardinal virtues of Wisdom, Justice, Temperance, and Strength, and related virtues, to a heroic degree, in the case and for the purposes in question."

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canonizzazione e procedura nella Cost. Apost. 'Divinus perfectionis Magister': considerazioni e valutazioni," in *Monitor Ecclesiasticus* 110 (1985), pp. 365–400; R. RODRIGO, *Manual para instruir...*, cit.; R.J. SARNO, *Diocesan Inquiries Required by the Legislator in the New Legislation for the Causes of Saints* (Rome 1987); W. SCHULZ, *Das neue Selig- und Heiligsprechungsverfahren* (Paderborn 1988); F. VERAJA, *Commento alla nuova legislazione per le Cause dei Santi. Sussidi per lo studio delle Cause dei Santi* (Rome 1983).

14. Cf. P. PALAZZINI, "Un discorso inedito di Pio XII: vaticinava la nuova legislazione per le Cause dei Santi," in *Pius XII. In memoriam* (Rome 1984), pp. 87–113; idem, "La perfettibilità della prassi procesuale di Benedetto XIV nel giudizio di Pio XII," in *Miscellanea in occasione del IV Centenario della Congregazione per le Cause dei Santi (1588–1988)* (Vatican City 1988), pp. 61–87. To achieve this flexibility, some formalities were repressed that impeded the advancement of the causes without, however, contributing in any substantial way to their deeper study: for example, the development of the process in two phases termed informative and apostolic. The logical consequence of this policy was to suppress some prescriptions of the preceding law, like the one which prohibited the discussion of virtues until fifty years after the death of the Servant of God (cf. c. 2101 *CIC*/1917).

15. Cf. *Normae servandae...*, cit., no. 7.

b) In cases of martyrdom: "If there is evidence of the martyrdom and its cause, in the case and for the purposes in question."

c) For a miracle: "If there is evidence of the miracle in the case and for the purposes in question."

2. *Actor*

The actor is the one who promotes the cause of canonization. This function can be exercised by anyone who belongs to the people of God, as well as a group of faithful admitted by the ecclesiastical authority.[16] For practical purposes, the actor must offer a sufficient guarantee of continuity, because his or her task consists not only of asking that the cause be initiated, but also of promoting and sustaining it throughout all its phases.[17]

3. *Postulator*

The actors must appoint a postulator, upon whom they will confer the respective mandate, approved by the competent bishop.[18]

4. *Competent Bishop*

Number 5a of the *Normae* provides: "For the instruction of causes of canonization, the bishop in the territory where the Servant of God died is competent, unless there are other special reasons indicating otherwise, which must be approved by the Congregation for the Causes of the Saints."[19] When there is investigation on an alleged miracle, the bishop of the place where the event occurred will be competent.[20]

16. *Normae servandae...*, cit., no. 1a. Cf. also *DPM* 1.
17. Regarding the active legitimization of an unrecognized association, cf. the authentic interpretation of June 20, 1987: *AAS* 80 (1988), p. 1818; and decision of the Signatura, January 23, 1988, text published in *Ius Ecclesiae* 1 (1989), pp. 197–203.
18. Cf. *Normae servandae...*, cit., nos. 1b, 2a. Moreover, when the cause comes before the Congr., the postulator should maintain a stable residence in Rome (ibid., no. 2b). Regarding the qualities that the postulators should possess, cf. ibid., no. 3a. Currently it is not necessary for them to be priests, as the preceding legislation had established (cf. c. 2004 §3 *CIC*/1917). Normally, with the consent of the *actores*, the postulators resident in Rome appoint a vice-postulator to follow the steps that must be carried out in the diocese (cf. *Normae servandae...*, cit., no. 4).
19. Cf. also *DPM*, no. 1; c. 381 §2 and *SMC*, a. II § 1.
20. Cf. *Normae servandae...*, cit., no. 5b. Proofs regarding an alleged miracle should be collected separately from those that refer to the virtues or to the martyrdom of the Servant of God (*DPM*, no. 2,5°).

B. *Diocesan phase*

The following exposition particularly takes into account the development of the process concerning the virtues of a Servant of God, in which evidence must be presented on the heroism in each of the virtues, as well as of the consistency of that exercise, which cannot be limited to sporadic acts or reduced to the last period of the life of the Servant of God, although special attention should naturally be paid to his or her later years.

In a process on martyrdom, the life and virtues of the Servant of God must be investigated,[21] albeit taking into account that it is necessary and sufficient to prove the martyrdom and its cause, that is: a) *material martyrdom*, the actual death, caused through violence;[22] and b) *formal martyrdom*: that death must have been caused by hatred of the faith, and the martyr must have accepted it because of love of the faith.[23]

1. *Admission of the cause by a bishop*

Once at least five and no more than thirty years have passed since the death of the candidate, the postulator can present the petition for the cause to begin.[24] Along with the petition, the following must also be submitted:

21. It is the doctrine of the Church that martyrdom wipes out current sins, both their fault and their punishment. This is why, in the causes regarding martyrdom one has to prove only this, without having to take into account whether or not the Servant of God was a sinner beforehand (cf. BENEDICT XIV, *De Servorum*, cit., *Liber* I, ch. 28, no. 8; *Liber* I, ch. 29, nos. 1–2; *Liber* III, ch. 15, nos. 7–19).

22. The public executions of the past have given way in the twentieth century to clandestine executions, which is why in many cases the lack of witnesses impedes the proof of the material martyrdom.

23. Regarding martyrdom, cf. *S. Th.*, II–II, q. 124; C.F. DE MATTA, "Novissimus de Sanctorum…," cit., *pars* II, ch. 11 and *pars* IV, ch. 21–22 (pp. 83–87 and 402–411); BENEDICT XIV, *De Servorum…*, cit., *Liber* III, ch. 11–20 (pp. 92–207); R. HEDDE, "Martyre," in *Dictionnaire de Théologie Catholique*, X–1 (Paris 1928), cols. 220–254. Among the more recent authors, cf. A. FILIPAZZI, *La prova del martirio nella prassi recente della Congregazione delle Cause dei Santi*, Doctoral thesis in the Roman Athenaeum of the Holy Cross (Rome 1992); B. GHERARDINI, "Il martirio nella moderna prospettiva teologica," in *Divinitas* 26 (1982), pp. 19–35; idem, "Il martirio nell'attuale 'temperies' teologico-giuridica," in *Studi in onore del Card. Pietro Palazzini* (Pisa 1987), pp. 159–175; I. GORDON, "De conceptu theologico-canonico martyrii," in *Ius Populi Dei. Miscellanea in honorem Raymundi Bidagor*, I (Rome 1972), pp. 485–521; J.L. GUTIÉRREZ, *La certezza...*, cit.; A. KUBIS, *La théologie du martyre au vingtième siècle* (Rome 1968); E. PIACENTINI, "Concetto teologico-giuridico di martirio nelle Cause di Beatificazione e Canonizzazione," in *Monitor Ecclesiasticus* 103 (1978), pp. 184–274; idem, *Il martirio nelle Cause dei Santi*, (Vatican City 1979); W. RORDORF-A. SOLIGNAC, entry "Martyre," in *Dictionnaire de Spiritualité*, LVI–LVII (Paris 1978), cols. 718–737.

24. Cf. *Normae servandae…*, cit., nos. 8–9. If more than thirty years have gone by without any progress the bishop must confirm that this delay is not due to fraud or deceit (cf. ibid., no. 9b).

a) a biography of the candidate or, at least, a thorough chronological account of the life, virtues, reputation for saintliness and miracles, as well as a report of any difficulties foreseen for the cause;[25]

b) any writings by the candidate that have been published;[26]

c) if the cause is recent, the list of witnesses who may be questioned regarding the virtues of the candidate or regarding the martyrdom shall be submitted.[27]

Once that petition is received, the bishop asks the bishops' conference or, at least the bishops of the region, for their opinion on the appropriateness of initiating the cause.[28]

Moreover, the same bishop "will make public the petition of the postulator in his diocese and, if he finds it advisable, in others as well, with the consent of the respective bishops, inviting all the faithful to provide him with useful information related to the cause of which they have knowledge."[29]

Therefore, there are two possibilities:

a) The information received may reveal an obstacle of some importance against the cause. If this occurs, the bishop shall report it to the postulator, so that he may attempt to remove it.[30] If the bishop believes that the cause cannot be admitted, he will advise the postulator, stating the reasons for his decision.[31] This decision takes the form of a singular decree (cf. c. 48), which must be in writing and with at least a summary statement of the reasons (cf. c. 51 and, regarding the effects of administrative silence, c. 57). The postulator may lodge recourse against this decree (cf. cc. 1732 *et seq.*).

b) The second possibility is that the bishop may decide to introduce the cause. In that case, he will issue the respective decree. From that moment on, the candidate can be referred to by the title "Servant of God." Then, the bishop shall request an opinion from two theological censors regarding the published writings of the Servant of God.

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25. Cf. *DPM*, no. 2,1°; *Normae servandae*..., cit., no. 10,1°.
26. Cf. *DPM*, no. 2,2°; *Normae servandae*..., cit., no. 10,2°. Regarding the writings in general, cf. F. LEONE, *La prova documentale degli scritti nei processi di beatificazione e canonizzazione (studio storico-canonico)* (Sessa A. 1989).
27. Cf. *DPM*, no. 2,4°; *Normae servandae*..., cit., no. 10,3°.
28. Cf. *Normae servandae*..., cit., no. 11a. Regarding the concept of region, cf. c. 433. For the Eastern rite Eparchies, the opinion of the .Eparchal bishops and of the other Hierarchs of the territory of the respective Patriarchal or Metropolitan *sui iuris* Church should be sought. One should consult the Holy See regarding the procedure in the case of a Church outside the patriarchal territory or the territory of another *sui iuris* Church.
29. *Normae servandae*..., cit., no. 11b.
30. Cf. ibid., no. 12a.
31. Cf. ibid., no. 12b.

If the theological censors state in their opinion that they have found nothing against the faith and customs,[32] the bishop shall order that the remaining writings of the candidate be collected, that is, any that have not yet been published, as well as any historical documents, manuscripts as well as printed material, having any relationship to the cause.[33] Especially when they are causes requiring thorough historical research, whether or not they are *old* in the technical sense, the bishop shall assign that research to experts in history and archiving, who, once their work is done, shall submit to the bishop all the material found, attaching a clear and complete report in which they detail how they have performed their office and that they ensure that they have performed it faithfully. They shall also submit an index of the writings and documents collected, with their opinion regarding their authenticity and value, as well as regarding the personality of the Servant of God, as can be gathered from those writings and documents.[34]

However, although the *Normae* provide for the collecting of the unpublished writings of the Servant of God as well as the documents, before the constitution of the tribunal, often this work, performed by experts (who constitute what, in some documents, is called the "historical commission"), is performed at the same time the tribunal proceeds to the questioning of witnesses *ne pereant probationes* (so that the evidence does not perish), especially for those witnesses whom, due to their age or health, etc., it would not be wise to defer questioning.[35]

The need to not allow the evidence to perish is presented almost habitually (if the Servant of God died at an advanced age, it would be unwise to act as if his or her contemporaries were going to survive him or her for a long time in physical and mental conditions to be able to testify with full clarity). Therefore, the search entrusted to the experts is usually performed at that same time that the tribunal is hearing the witnesses, which often implies that the first formal act of the bishop when he has accepted a cause is to appoint the judge, the promoter of justice, and the notary, who will constitute the tribunal.[36]

The bishop must also send the *CCS* a brief report on the life of the Servant of God and on the importance of the cause, to verify that the Holy See has no objection against this cause.[37] It is not asking the Congregation for permission to open the diocesan process, since this is done by the

32. Cf. ibid., no. 13; *DPM*, no. 2,2°.
33. Cf. *Normae servandae*..., cit., no. 14a; *DPM*, no. 2,3°.
34. Cf. *Normae servandae*..., cit., no. 14b–c.
35. Cf. *DPM*, no. 2,4°; *Normae servandae*..., cit., no. 16a.
36. Moreover, even if the *periti* have completed their work before the establishment of the tribunal, they should be called on to make declarations before it in their capacity as witnesses to the office (cf. *Normae servandae*..., cit., no. 21b).
37. Cf. ibid., no. 15c.

diocesan bishop by virtue of the ordinary and proper power he enjoys,[38] but only inquiring if there is any circumstance that may in the future hinder the proper development of the cause. Therefore, before responding, the *CCS* consults with the CDF and other dicasteries of the Curia (CB, if the Servant of God was a bishop; CICLSAL if he or she was a religious; etc.),[39] which shall research any information they possess in their respective archives in connection with the Servant of God.

2. *Appointment of the diocesan tribunal*

The appointments of those who make up the tribunal are made by the diocesan bishop by decree. Although that a cause of canonization does not exactly fall under the category of trials, for reasons of clarity, this commentary will refer to *processes* and the *tribunal*. It will also call the person the documents refer to as the "bishop's delegate" the *judge*.

The promoter of justice. The former norms provided for the presence of the promoter of the faith in all acts of a cause of canonization, also in diocesan processes (cf. c. 2011 § 2 *CIC*/1917). The functions that were attributed to him are now performed in part by the promoter of justice (cf. cc. 1430 et seq.), who must be a priest, with a good theological and canonical background, and also historical training when they are old causes.[40] The first function of the promoter of justice is preparing the interrogatories or questions to be asked of the witnesses regarding the life, virtues, or martyrdom and the reputation for saintliness or martyrdom of the Servant of God. In old causes, those questions will be limited to the current persistence of the reputation for saintliness or martyrdom and, if applicable, the worship offered the Servant of God.[41]

The bishop shall also appoint a judge or delegate of the bishop. There is nothing to prevent the bishop from personally performing this function,[42] but this task is usually entrusted to his delegate, who, like the promoter of justice, must be a priest and have a strong theological and canonical background, and a strong historical background if it is an old cause.[43]

38. Cf. *DPM*, no. 1.
39. Regarding some practical cases, cf. R. SARNO, *Diocesan Inquiries...*, cit., pp. 48–52; W. Schulz, *Das neue...*, cit., pp. 66–70. If some obstacle is presented, the postulator has the right to employ the appropriate means to try to remove it.
40. Cf. *Normae servandae...*, cit., no. 6b.
41. Cf. ibid., no. 15. A model of those modes of questioning that should be adapted to each case can be consulted in R. RODRIGO, *Manual...*, cit., pp. 154–172.
42. Cf. *Normae servandae...*, cit., no. 16a.
43. Cf. ibid., no. 6a.

Moreover, the bishop must appoint a notary[44] for the cause and, usually, an official (*cursor*) to serve the summons on the witnesses, etc. The notification of the acts of the process can also take place by mail or any other absolutely secure method, pursuant to the norms of particular law, and it must be recorded in the acts of the tribunal (cf. c. 1509).

The judge, promoter of justice, notary and cursor must swear to perform their function faithfully, and they are obligated to maintain secrecy.[45]

3. *First session of the diocesan tribunal*

The postulator or the vice-postulator, as well as other persons interested in the cause, usually attend the first session, which is held with some solemnity. At this session, the following acts usually take place:

a) the postulator or vice-postulator presents his or her mandate and reads the petition, which will later be given to the bishop for him to initiate the cause;

b) the chancellor of the diocesan curia reads the letter from the *CCS* by which it reports that, on the part of the Holy See, there are no obstacles to initiating the cause;[46] and he also reads the decree by which the bishop appoints those who make up the tribunal;

c) the diocesan bishop, judge, promoter of justice, notary and cursor swear to perform their function faithfully and to maintain secrecy;[47]

d) the postulator presents a list of witnesses he wishes to have questioned by the tribunal[48] and takes the oath that he will faithfully perform his office;[49]

44. Cf. ibid.

45. Cf. ibid., no. 6c.

46. Nothing prevents the case from starting before the reply from the Congr. has been received, if the bishop use his own authority to open the process. In this case, it is enough that the reply be entered into the record when it arrives. If the Congr. should point out any doubtful aspect that must be clarified by the questioning of witnesses or the search for documents, the letter need not be read in public, and, in this case, the chancellor can limit himself to revealing only that the reply of the Congr. has arrived.

47. Cf. *Normae servandae*..., cit., no. 6c.

48. This list does not necessarily coincide with the presentation by the postulator together with the writ of petition: logically the work that has taken place from the time the opening of the cause was first requested has found witnesses who were perhaps not considered at first and, in general, has evaluated more exactly the degree of familiarity that every possible witness had regarding the Servant of God.

49. The *CIC*/1917 had prescribed for the postulators and vice-postulators the oath termed "de calumnia," that is, an oath to always tell the truth throughout the process and never to act fraudulently (cf. c. 2037 §4). The current norms do not explicitly demand that the postulator take the oath, even though the obligatory nature of the same is considered as included within the general reference of c. 1403 §2 to the norms that *ex natura sua* should apply to the processes of canonization (cf. c. 1532).

e) the bishop and the judge set the date for the following session and order that the promoter of justice and the witness(es) who must be questioned be summoned to appear thereat.[50]

4. *Successive sessions of the diocesan tribunal*

The diocesan tribunal must not pronounce any judgment. Its mission consists of collecting all the witness statements and other means of proof which will later, in successive phases that take place in the *CCS*, allow the issuance of an opinion on whether the Servant of God heroically practiced the virtues, truly suffered martyrdom, or if a miracle took place because of his or her intercession.

The objective of the process is not to conduct a generic investigation, but rather to answer the question of whether there is evidence of virtues, martyrdom or a miracle. Any other search regarding the historical environment in which the Servant of God lived, the thinking characteristic of the times, etc., will be useful only to the extent that it sheds light on the answer to that question.

For their part, the judge and the promoter of justice shall not limit themselves to hearing the witnesses and receiving any documents submitted to them, etc., but must see that the evidence is complete, such that, as a result, they themselves may reach that moral certainty regarding the heroic degree of the virtues, etc., on which they must rule in successive instances.

The witnesses should be asked about the content of the interrogatories prepared by the promoter of justice. However, the judge, on his own initiative or at the instance of the promoter of the faith, shall ask the witness any questions ex officio that he finds appropriate to clarify any aspect of the cause.[51] If, for instance, a witness mentions some fact on the life of the Servant of God not mentioned in the interrogatories of the promoter of justice, the judge will ask him or her to go into detail and will also ask about the same thing with any other witnesses who can provide information. Moreover, if a witness states that someone else can add information regarding a specific incident, the tribunal shall consider whether it should call that person as a witness ex officio, even if his or her name is not on the list of witnesses submitted by the postulator.

If the tribunal believes that the evidentiary mechanism is insufficient, it will invite the postulator to present more witnesses or documents

50. For a more detailed description of this first session and a model of the act that should be compiled, cf. A. CASIERI, *Postulatorum vademeum*, cit., pp. 23–27; R. RODRIGO, *Manual...*, cit., pp. 70–73 and 172–175.

51. Cf. *Normae servandae...*, cit., no. 16c. The judge should always make the questions: cf. c. 1561 of the CIC.

or to carry out the appropriate investigation. The judge and the promoter of justice shall bear in mind that their best contribution to the good of a cause consists precisely of dealing with sufficient depth with all issues presented, such that the acts leave nothing to be desired.[52] If the process is sent to Rome with gaps, the *CCS* will demand that they be corrected, but this will considerably increase the work of preparing the cause, often with scarce possibilities of requesting statements from eyewitnesses, who may have died during the time that has lapsed. Moreover, the passing of time makes it difficult to locate documents that might have been easily found during the diocesan process. Experience has also highlighted the importance of gathering statements from witnesses and documents that prove the reputation for saintliness enjoyed by the Servant of God, as well as its scope.[53]

With regard to the promoter of justice, the *Normae* provide for his presence at the questioning of the witnesses and, if he has not been present, he must examine the respective acts to be able to make remarks and propose whatever he deems necessary or appropriate.[54]

The tribunal can act only within the limits of the diocese for which it was constituted. If witnesses are to be questioned who live in another diocese, it is possible to: *a)* invite them to appear before the tribunal; *b)* request advance permission from the bishop of that area in order that the tribunal may travel to the diocese in which the witnesses reside, in order to question them; *c)* ask the competent bishop to have the tribunal of the diocese in which they reside question those witnesses (rogatory process); this tribunal, once it has performed this task, shall send the acts to the tribunal that has requested the questioning.[55]

Witnesses are persons who, once summoned by the judge, are questioned by him.[56]

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52. Cf. *Normae servandae...*, cit., no. 27. Number 27c of the *Normae* moreover anticipated that "the postulator should be given the possibility of examining the acts of the process so that, if he judge it appropriate, he can complete the proofs with new documents or witnesses." This examination of the records by the postulator (or the vice-postulator) would ordinarily take place when the process is concluding.

53. Cf. R. ZERA, *La fama di santità (fondamento morale e rilevanza giuridica)* (Crotone 1984).

54. Cf. *Normae servandae...*, cit., no. 16b; c. 1433.

55. Regarding the questioning of witnesses (and, in general, regarding the procedure of the judge in collecting proof) it would be within one's own territory, cf. cc. 1418 and 1469 §2. Ordinarily, the first two suitable possibilities in the text are preferable. A rogatorial process seems advisable only when many witnesses reside in one place and great difficulties are involved both regarding their transfer to the seat of the tribunal as well as from there back to the diocese in which the witnesses have their domicile.

56. Cf. *DPM*, no. 2,4° and *Normae servandae...*, cit., nos. 16–25. Those who do not present themselves before the tribunal cannot be considered witnesses: for example, those who send the judge a written declaration, even one authenticated by a notary (cf. *Normae servandae...*, cit., no. 25b). Regarding the qualities of the witnesses cf. also cc. 1548–1550 and 1555.

Witnesses can be: a) *de visu* or eyewitnesses, if they testify regarding what they know by their own direct knowledge; *de auditu*, if they give testimony on what they have heard from others (witnesses *de auditu a videntibus* are particularly important);[57] b) *inducti* witnesses, that is, presented by the postulator on the list he submits at the first session; and ex officio witnesses, who are called by the tribunal.[58]

Moreover, according to the *Normae*:

— in causes of canonization, persons should be called as witnesses who have blood and similar relationships with the Servant of God and any persons who have lived with or had an intimate relationship with him or her;[59]

— if the Servant of God was a member of an institute of consecrated life,[60] a notable portion of the witnesses presented must be from outside the institute, unless it is practically impossible, due to the type of life led by the Servant of God;[61]

— the following persons cannot be called as witnesses: the postulator of the cause, while he is performing his office, or anyone who was normally a confessor of the Servant of God, or any of his spiritual leaders, with regard to what the Servant would have expressed in his or her conscience, albeit outside of the sacrament of the confession.[62]

Regarding the statements of the witnesses, the questioning of some witnesses can be advanced *ne pereant probationes*. The witnesses will be questioned, in the first place, from the interrogatories prepared by the promoter of justice, but the judge and the promoter of justice must also pose any questions they find necessary or useful, so that there be no uncertainty in the witness's statements and any difficulties posed by them be resolved.[63] "In their statements, which must be confirmed with an oath, the

57. In the *Normae servandae*..., cit., no. 17, it is established that "[t]hey should be eyewitnesses; in addition to these, if need be, can be added others *de auditu a videntibus*: but all have to be capable of credible testimony."

58. Cf. ibid., no. 21.

59. Cf. ibid., no. 18.

60. One can affirm that the norm is equally valid for the members of a society of apostolic life.

61. Cf. *Normae servandae*..., cit., no. 19.

62. Cf. ibid., no. 20.

63. Cf. ibid., no. 16c. It is appropriate here to insist on the import of the questions asked of the witness by the judge of his own accord or at the request of the promoter of justice. These questions should refer above all to the facts best known by the witnesses. There would be no use asking questions regarding the childhood of the Servant of God of a witness who knew and dealt with him or her only during the final years of life (unless there is no one to testify *de auditu a videntibus* regarding the important facts which lack witnesses *de visu*).

witnesses will indicate the source of the knowledge they are affirming; if they do not, the testimony will be null."[64]

The usual system for questioning witnesses consists of asking them questions to which they respond orally. These answers are summarized by the judge, who dictates them to the notary, and they are read to the witness when the statement is concluded, in order that he or she may state whether there is anything to add, delete, or change.[65]

The use of a tape recorder is also allowed, if the answers are later written down and signed, if possible, by those who have given testimony (cf. c. 1567 § 2). In that case, when the questioning is concluded, "the record of the evidence ... as played back from the tape recording, must be communicated to the witness, who is to be given the opportunity of adding to, omitting from, correcting or varying it. Lastly, the witness, the judge, and the notary must sign the record" (c. 1569).[66]

A witness may present his or her statement in writing, if he or she swears to be the author of that writing and that what is set forth therein is the truth.[67] This possibility of making a written statement does not stop the person who makes it from being a witness, provided that he or she appears in person before the tribunal to confirm the statement under oath and to answer any questions the judge deems appropriate to ask.[68]

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64. Ibid., no. 23. It is no longer prescribed in the current legislation, as it was in c. 2037 §3 *CIC*/1917, that the witnesses take two oaths: one before the declaration, to tell the truth, and one after the questioning, to have said the truth. Nevertheless, the current practice in the tribunals is to take the oath of the witness both before and after the questioning. Ordinarily, the witnesses state at the beginning of the questioning whether their declaration is based on direct knowledge or in what they have heard from others (specifying the source).

65. Cf. cc. 1558–1570. One can never insist too much on the importance of skillfully questioning the witnesses so as to aid them in expressing in a complete manner all that they know of the matter at hand without indulging in useless digressions and without limiting themselves to simple yes or no answers to the questions (which themselves need to meet the specifications outlined in c. 1564).

66. When using a tape recorder, one must make a word for word transcription of all that the witness has declared, a process which can very easily make the acts of the inquest unreasonably long and tedious. That is why the judge has the right (and it seems advisable for him to do it in a limited fashion and not for the entire cause) to decide whether or not it is appropriate to record all or part of the declaration of a witness.

67. Cf. *Normae servandae...*, cit., no. 24.

68. If that written declaration is long, an appropriate amount of time should be allotted between its submission and the appearance of the witness before the tribunal so that the judge and the promoter of justice can read it and formulate the necessary questions or requests for clarification. It is no easy matter to give unequivocal advice on whether or not the declarations of witnesses given in writing, in general, should be admitted when the witness has to relate in detail some specific event from the life of the Servant of God. This, however, cannot become the regular system of replying to the questions of the promoter of justice (who, among other things, should not be known to the witnesses outside of the process). Therefore, one should avoid accumulating declarations of a brief and general nature, written as well as oral.

In addition to the witnesses presented by the postulator (*testes inducti*), the tribunal should ex officio summon some other witnesses (*testes ex officio*).[69] The norms foresee the obligation to summon any witnesses who may contribute to making the instruction phase complete.[70] This method ensures that, in addition to the witnesses selected by the actors, others designated by the judge will testify. Normally, the designation of any witnesses who must be summoned ex officio will take place when the process is close to its conclusion. At that time, the tribunal will be in better circumstances to decide which issues need to be cleared up or investigated in more detail.

Any witnesses who have conducted a search for documents and have drafted a report in that regard should be called as witnesses ex officio. They must state under oath that they have done all the research and have set forth all the documentation related to the cause, and that they have not altered or defaced any document or text.[71]

5. *Conclusion of the instructive phase*

Before the conclusion, the judges, promoter of justice and the postulator must verify that the acts are complete and that everything was done that should be done to gather evidence.[72]

Normally, at one of the last sessions, the tribunal will proceed to inspect the grave of the Servant of God, the places where he or she lived and died, or other related places, to verify that no public worship is offered and to issue the appropriate statement regarding compliance with the decrees of Urban VIII *super non cultu*.[73]

In addition to the original, which shall be kept in the archives of the diocese, two copies shall be made of the acts of the process to be sent to

69. Cf. *Normae servandae...*, cit., no. 21a. These witnesses should belong to one of two categories: those who were neither presented by the postulator nor summoned ex officio by the tribunal. They will have the opportunity, in any case, to explain why they think they should be given a hearing. The tribunal, in turn, will have the right to decide whether these witnesses should be cited.

70. Ibid.

71. Ibid., no. 21b.

72. Cf. ibid., no. 27.

73. Cf. *DPM*, no. 2,6°; *Normae servandae...*, cit., no. 28. The full title of the cited collection of decrees is *Urbani VIII Pontificis Optimi Maximi Decreta servanda in Canonizatione et Beatificatione Sanctorum. Accedunt Instructiones, et Declarationes quas Em.mi ac Rev.mi S.R.E. Cardinales Praesulesque Romanae Curiae ad id muneris congregati ex eiusdem Summi Pontificis mandato condiderunt*, Rome, ex Typographia Rev. Camerae Apostolicae 1642. Regarding the absence of cult, cf. F. VERAJA, *La beatificazione. Storia, problemi, prospettive* (Rome 1983), pp. 69–79. In the preceding legislation foresaw a specific process *super non cultu*: cf. cc. 2057–2060 *CIC*/1917; PAUL VI, m.p. *Sanctitas clarior*, March 19, 1969, no. 5,2°, in *AAS* 61 (1969), p. 152.

Rome. Once the copies are made and it is verified that they agree with the original, the notary signs and seals each page.[74] The archetype or original of the acts, properly sealed and stamped, shall be kept in the archives of the diocesan curia.[75] The true copy of the acts (*transumptum*) with all the attached documents must be sent to the *CCS* in duplicate, together with a copy of the writings of the Servant of God that were examined by the censor theologians and the opinion given by them.[76] With the acts, the diocesan bishop or the judge shall send the Cardinal Prefect of the *CCS* a statement of his opinion on the credibility due by the witnesses who were questioned, as well as on the lawfulness of the acts.[77]

The *closing session* is usually presided over by the diocesan bishop. The judge, promoter of justice, notary, postulator or vice-postulator, and the person who shall be responsible for delivery of the acts to the *CCS* usually participate. As with the opening session, other persons may also attend.[78]

74. Cf. *Normae servandae...*, cit., nos. 29–30. When the copy of the original acts was still written by hand, two persons (generally the notary and the copyist) had to read the entire text aloud, including the documents, and check its accuracy. The current practice is for the photocopies of the original to be authenticated by the notary.

75. Cf. ibid., no. 30b. No longer in effect is the provision of c. 2056 §1 *CIC*/1917, in accordance with which the archetype could not be opened without the permission of the Holy See.

76. Cf. *DPM*, no. 2,6°; *Normae servandae...*, cit., no. 31a–b. Both *DPM* as well as the *Normae* establish that the "books" must be sent to the Congr.; this actually means, however, that they should send a copy of all of the writings of the Servant of God—published and non-published—that are to be taken into account when working on the *Positio*.

77. Cf. *Normae servandae...*, cit., no. 31c. In some cases, that declaration is limited to noting that everything has been carried out in accordance with the norms and that the witnesses should be considered as capable of credible testimony; on other occasions, the declaration gives a detailed notice on the credibility merited by some witnesses or documents, favorable or contrary to the cause. This report takes on great importance, facilitating as it does an objective evaluation of the content of those documents or declarations. In the preceding law (cf. c. 2063 §2 *CIC*/1917), the three judges then sitting on the tribunal (unless the local ordinary was personally exercising this function: cf. c. 2040 §1 *CIC*/1917) and the promoter of the faith had to send this report. Even though the current norm only imposes the obligation on the diocesan bishop or judge, prudence suggests the practice followed in almost all the dioceses: that of sending along with the documents of the process declarations compiled separately by the bishop, the judge, and the promoter of justice. In effect, the bishop should be informed about the development of the process, but ordinarily he will not himself have the information necessary in order to formulate a nuanced opinion on the credibility that a specific witness merits, etc. On the other hand, it is reasonable to expect that the judge and the promoter of justice will have a direct and detailed knowledge of the issues by virtue of having personally interviewed the witnesses.

78. On the actual development of this session, cf. A. CASIERI, *Postulatorum vademecum*, cit., pp. 80–85; R. RODRIGO, *Manual...*, cit., pp. 103–106 and 233–239.

6. *Observations regarding the process involved with a presumed miracle*

Once the declaration of the heroic virtues is obtained, for beatification, it is also necessary to obtain verification of a miracle worked through the intercession of the Servant of God (when the cause concerns the martyrdom and it is proven, no miracle is necessary to proceed to beatification). Moreover, for the canonization of a beatified, a miracle due to his or her intercession is necessary, even if her or she is a martyr.

A miracle is an event that cannot be explained according to the laws of nature, and has been brought about by God in response to the intercession of a Servant of His. Therefore, in processes on an alleged miracle, evidence must be gathered on the event itself and on the attribution of that event to the intercession of a certain Servant of God. The process on miracles takes place separately from that of virtues or martyrdom, and is carried out according to general provisions and those established in nos. 32–35 of the *Normae.*[79]

Before formally requesting the opening of a process concerning a miracle, the postulator must be certain that his petition is well founded. He will first ask for an opinion from experts in the field in question. The miracles examined in causes of canonization usually consist of prodigious healings.

The bishop of the territory in which the alleged miracle took place is competent to handle the process.[80] Once he has received from the postulator the petition or pleading for the process to open, with a brief but thorough report on the possible miracle and the documentation related thereto attached, the bishop shall ask for an opinion from one or two experts[81];

If the bishop considers that the process should be opened, he appoints the components of the tribunal,[82] and the promoter of justice (with the help of an expert) prepares the interrogatories. If it concerns a healing, the tribunal will consult a physician who, with respect to all the technical aspects, will be the one to formulate the questions for the witnesses and ask for the appropriate clarification.[83]

79. Cf. also *DPM*, no. 2,5°.
80. Cf. *Normae servandae*..., cit., no. 5b.
81. Cf. ibid., no. 33a. In addition, in this case the postulator has the right to recourse if the bishop decides not to open the process.
82. Cf. ibid., no. 33b. In this case it is not necessary to consult the *CCS* if there is any obstacle in this regard, given that the Congr. would already have expressed its opinion about the opening of the cause when the diocesan process on the virtues of the Servant of God began.
83. Cf. ibid., no. 34a. The judge will ask the rest of the questions, which will be directed toward determining which persons and in what manner they have invoked the Servant of God, seeking his intercession.

If the person healed is still alive, some physicians must visit him or her to verify his or her current state of health and whether or not the healing lasted.[84]

Among the witnesses, the physicians who attended the person in his or her illness must be called. If they refuse to appear before the tribunal, the judge will seek to have them at least submit a sworn report on the course of the illness; if he cannot even obtain this, the judge will seek to have them at least state their opinion to a person serving as a liaison who can be questioned.[85]

Among the documents, it will usually be essential to include the clinical history of the patient. It will be necessary to present complete evidence regarding the illness, as well as the invocation of the Servant of God to whose intercession the miracle is attributed.

C. *Congregation for the Causes of Saints*

The following sources mainly refer to the structure and operation of the Congregation: *a)* the Apostolic Constitution *Divinus perfectionis Magister*; *b)* the *Decretum generale de Servorum Dei Causis, quarum iudicium apud Sacram Congregationem pendet*, of February 7, 1983[86]; *c)* the Apostolic Constitution *Pastor Bonus* (cf. especially arts. 71–74); *d)* the RGCR. At the time of this writing, the *CCS* had not yet developed its own regulations, according to the provisions of the RGCR, a. 1 § 2. Therefore, in the following explanation, normative sources will not always be cited, because references could only be made to the former regulations, which are still used provisionally when compatible with the legal provisions currently in force.[87]

84. Those medical doctors who visit the cured person are termed doctors *ab inspectione*, and must be at least two in number, even though in complicated cases it may be advisable for a larger group of medical doctors, with different specialties, to make the visit.

85. Cf. *Normae servandae*…, cit., no. 22.

86. Cf. *AAS* 75 (1983), pp. 403–404. This concerns a general decree issued by the Congr. in virtue of the faculty that had been conceded to it in *DPM*, which sets forth the temporary provisions on the method of continuing the examination of the causes which were under preliminary study in the Congr. according to the preceding norms.

87. The preceding regulation was approved *ad experimentum* for the period of three years beginning March 21, 1983 (not published in *AAS*). Thereby were established the norms for applying the *REU* and *DPM*, as well as the prescriptions of the *CIC* regarding the causes of canonization.

1. *Causes regarding virtues or regarding martyrdom*

a) Once the acts of the diocesan process are received, the first step taken by the Congregation is to verify their validity.[88] The process is next assigned to a Reporter,[89] whose duty it is to examine the acts of the cause and send them to the *collaborator* presented by the postulation,[90] for him to draft the *Positio*[91] and have it printed.[92] The printed *Positio* shall be submitted to the Congregation by the postulator, and shall wait its turn to be examined.

Any *Positiones* on old causes, or recent causes for reasons of a historical nature the General Reporter recommends it, shall first be submitted for consideration to five Consultors who specialize in history, who, presided over by the General Reporter, shall render their opinion on whether the work has been prepared with scientific accuracy and is sufficient for the purposes in question. If the answer of the majority of the Consultors is affirmative, the cause shall be transferred to the next instance; if not, the Congress shall decide how to proceed.

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88. The study regarding the validity of the process was made by the Subsecretary (cf. *DPM*, no. 5). That study was submitted to the Congress, which met every week, on a fixed day, with the participation of the Cardinal Prefect, the Secretary, the Subsecretary, the Promoter General of the Faith, and the Relator General. The Congress declared, by means of a decree, the validity of the process.

89. Cf. *DPM*, nos. 6–8. There are currently seven Relators, among whom the Relator General is *primus inter pares*. At the request of the postulator and with the participation of the Relator General, the Congress designates a Relator for every cause.

90. The Relators exercise their task according to the principle of collaboration in the search for the truth, that, in the methodology and the current norms of the Congr., occupies the place previously assigned to the litigation between the postulators and the Promoter of the Faith (cf. A. Eszer, *La Congregazione...*, cit., pp. 317–318).

91. The name *Positio* is given to the printed volume that contains: a) the declarations of the witnesses and the other documents, both procedural and extra-procedural; b) the judgment regarding the writings of the Servant of God; c) an exposition on the history of the cause, supporting materials, the life, the virtues (or the martyrdom) of the Servant of God and his or her reputation for sanctity, which follow from and summarize the acts of the process. Frequently, the *Positiones* on virtues take up a few thousand pages. Those on martyrdom can be briefer, since one only has to prove the fact of the material and formal martyrdom (see above, II, B), though a good biography of the Servant of God should always be present; nevertheless, the volume can increase considerably when dealing simultaneously with various Servants of God martyred at different times.

92. It is up to the Relator, as an official of the Congr., to direct his collaborator in that work and to indicate to him the aspects that should be clarified or the investigations that must be carried out, etc. At the same time, he is to submit any questions that arise to the decision of the Congress. The amount of time needed to prepare a *Positio* will depend, moreover, on the complexity of the cause (the cause of a Pope, in principle, would demand the study of aspects of the exercise of the virtue which would not be necessary to consider when dealing, for example, with a Servant of God who worked out his sanctification by acting as porter at an educational center); but it will also depend on how much time and, in general, the amount of materials available to the collaborator, or the team of collaborators, to carry out their work.

Then, each *Positio*, regardless of whether it has been subject to the opinion of historians, is examined by the Promoter General of the Faith and by eight theologian Consultors.[93] If at least two thirds of the voters have voted in the affirmative, the *Positio* is submitted to the Assembly of the Cardinals and bishops who are members of the Congregation, in which the Secretary of the Dicastery also has a vote.

The Holy Father, informed of the result of these studies, orders that the decree be promulgated by which it is declared that the Servant of God practiced the virtues to a heroic degree (and, from that time on, can be called *Venerable*)[94] or died a martyr. Once the decree on martyrdom is given, it is possible to proceed to beatification. This does not occur with the decree on heroic virtues, because in this case, evidence of a miracle must be added along with its declaration by the Pope, through a decree similar to that on the virtues or martyrdom.

2. *Activity of the Congregation in processes having to do with miracles*

The process for gathering evidence on an alleged miracle must be conducted in the diocese where the event took place. Once the acts are received in Rome and their validity is examined by the Congregation, the actors, under the supervision of an official of the dicastery and with the assistance of experts, prepare a *Positio* similar to the one for the virtues or martyrdom, although much briefer. This *Positio* must contain the material necessary to prove the miraculous event as well as the fact that it is owing to the intercession of the Servant of God to whom it is attributed. Therefore, the *Positio* usually includes a detailed clinical history and the medical pronouncements, as well as testimony from physicians or those who have called on the Servant of God, requesting his or her intercession.

The Undersecretary summons and presides over the medical consultation, consisting in each case of five physicians of recognized prestige. After having formulated a precise diagnosis of the illness in question and the prognosis that they believe the case warrants, the question they should answer is whether there is any scientific explanation for the

93. It is the task of the Promoter of the Faith to formulate all the objections or *animadversiones* which could be made against the cause, to which the postulators would have to reply by means of advocates. Currently (cf. *DPM*, no. 10), the Promoter General of the Faith gives his judgment in writing, the same as the other Consultors, and presides over the meeting in which they, after hearing the reasons expounded by the others, decide on their definitive opinion. The vote of each Consultor can be: *affirmative*, if he considers that the heroic virtues or the martyrdom has been proved; *negative*, if the contrary be the case; and *suspensive*, if he suspends his judgment without pronouncing either for or against.

94. Until the twentieth century, the title of *Venerable* was often granted to those Servants of God for whom the process of canonization had begun.

healing as it occurred. If, after an individual as well as collective study, at least three of the physicians state that the case cannot be explained, the Promoter will then examine the *Positio*.

The Promoter General of the Faith and six theologian Consultors will render an opinion on two specific aspects: 1) if the healing considered by the physicians to be inexplicable according to current scientific knowledge can be theologically described as a miracle; and 2) if that miraculous healing must be attributed to the intercession of the Servant of God in question, in that he was invoked and not other saints, beatified persons, or Servants of God at the same time.[95]

The Cardinals and bishops who are members of the Congregation then examine the *Positio*. The result of the studies is presented to the Roman Pontiff, and all that is left is for the Pope to order the promulgation of the decree by which it is declared that there is a miracle due to the intercession of the Servant of God. When a cause already has decrees on the heroic virtues and on the miracle, or the decree on the martyrdom, the Holy Father decides whether to proceed to beatification.

For the canonization of a Beatified Person, evidence of a new miracle and the favorable decision of the Pope are required for him to convoke a meeting of Cardinals and bishops.

95. The petition is directed to God, through the intercession of his Servant. Of course, there is nothing to prevent any display of piety and devotion correctly understood, that is, in the same way as recourse to the Blessed Virgin Mary.

TITULUS I
De foro competenti

TITLE I
The Competent Forum

INTRODUCTION

Joaquín Llobell

I. Introduction

Since the beginning of canonical science, the discipline of the titles on judicial competence (*"De foro competenti"*) constitutes one of the main subjects of the law of the Church and the starting point for procedural norms. The Decree of Gratian in 1140 dedicates all the canons of issue VI of cause III to competence, in addition to referring to the subject in other places. In the Decretals of Gregory IX in 1234, the process occupies the entire text of the second of the five books that constitute that compilation. Saint Raimundo de Penafort organized in the first title (*"De iudiciis"*) of that second book the provisions related to the limits between secular and ecclesiastical jurisdiction. In the second title (*"De foro competenti"*), he compiled the criteria for the exercise of canonical jurisdiction by the diverse tribunals of the Church. Since the 13th Century, with a few exceptions, this organization was uniformly used, until it was received in the Code of 1917 (cc. 1552–1568) and in subsequent procedural norms for matrimonial causes[1] or of some tribunals.[2] Code doctrine, of a predominantly exegetical style, follows that pattern, dedicating considerable space to the study of "the competent forum." The *CIC* and the *CCEO* (cc. 1058–1082) have adopted the same structure. The concepts that will be explained in these commentaries set forth, therefore, a broad legal and doctrinal tradition that, along its essential lines, goes back to Roman law and is similar to the provisions of state provisions and doctrine. As a result, it is easy to understand the difficulty in selecting a bibliography to refer to and how impossible it is to attribute to a given writer the authorship of the concepts used. A considerable portion of the phenomena contemplated in cc. 1404–1416 "reproduce the former law" and, as a result,

1. Cf. PrM, arts. 1–12; *CM*, nos. 1–4.
2. Cf. NSSA, arts. 17–22 and 96.

"are to be assessed in the light also of canonical tradition" (c. 6 § 2). The commentary on this title and on cc. 1404–1416 forms a unit with the commentary we shall give later for the title and the canons on the competent forum for causes for declaring nullity of marriage (cc. 1671–1673).

II. CONCEPTS OF *JURISDICTION* AND *COMPETENCE*

1. *Jurisdiction*

Jurisdiction is the share in the judicial power of the Church (c. 135 §§ 1 and 3). It is possessed by all ecclesiastical judges with ordinary (proper or vicarious) or delegated power (cc. 131, 1419, 1427 § 2, 1442, 1512,3°), because the prohibition on delegating judicial power (c. 135 § 3) refers only to those who possess it through vicariousness or through delegation.[3] The "lay judges" established in c. 1421 § 2 therefore share in the power of jurisdiction, although the *CIC* is ambiguous in regard to the nature of this participation. By virtue of c. 274 § 1, the nature of the power would be delegated *a iure*, inasmuch as that canon prevents lay persons from sharing in the vicarious power of governance; that is, it seems to prohibit lay persons from holding an ecclesiastical office (c. 131).[4] Nevertheless, c. 228 § 1 allows that a lay person (man or woman) can hold a vicarious ecclesiastical office (like that of judge) for which it is necessary to possess a proper technical background and enjoy a good reputation (c. 1421 § 3); however, it is not necessary to have received the sacrament of orders.[5] This second approach makes it possible to maintain that lay judges (c. 1421 § 2) may cooperate vicariously in the exercise of the power of governance, although that power can only be exercised collegially: the necessary collegial exercise of jurisdiction does not alter the nature of the power (vicarious) of the members of the college.

Canon 129 § 1 identifies the ecclesiastical power of governance—the public power that c. 135 has divided, according to subject matter, into legislative, executive (administrative), and judicial power—with the power of jurisdiction. Notwithstanding this identification and considering the historical and philological origin of the term, by *jurisdiction* we mean only judicial power. The "*dictio iuris*" means the authoritative declaration of law on the case in dispute (the just method for resolving that dispute), carried out by an independent public organ at the instance of a party, between

3. Cf. *Comm.* 10 (1978), p. 243.
4. Cf. J.M. PINTO GÓMEZ, "La giurisdizione," in P.A. BONNET–C. GULLO (EDS.), *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), pp. 103–104 and 115–118.
5. Cf. S. BERLINGÒ, "Dal 'mistero' al 'ministero': l'ufficio ecclesiastico," in *Ius Ecclesiae* 5 (1993), pp. 91–120; R. PAGÉ, "Juges laïcs et exercice du pouvoir judiciaire," in M. THÉRIAULT–J. THORN (Eds.), *"Unico Ecclesiae servitio." Études de droit canonique offerts à Germain Lesage* (Ottawa 1991), pp. 197–212.

two juridical subjects situated in a formal position of equality. This definition of jurisdiction implies that, in order to affirm the existence of law and of the juridical nature of a given society, it is essential that procedural law (the group of norms regulating the exercise of jurisdiction) be applicable to any juridical relationship in dispute, even if one (or both) of the parties to the dispute is an organ of public administration.[6] If a right cannot be defended *jurisdictionally,* or if it is not an authentic right—which is why it is not protected—or justice is not sufficiently protected in that society, it is necessary to try to correct that deficiency in the respective system. In our explanation, we are dispensing with the distinction between *subjective right* and i, which is typical of the Italian system. By *right* we mean the demand of justice in each concrete juridical situation.[7]

2. *Competence*

Competence is the standing of a judge or tribunal to decide a cause, in such a way that the fundamental right (of each member of the faithful and of the community) to judicial defense is effectively protected (c. 221 §§ 1 and 2). That standing derives from the provisions of the legislator who, in the current system and with respect to processes, is only the Roman Pontiff, in addition to the Ecumenical Council. In fact, the Roman Pontiff has established, through legislation (in the *CIC*, in the *CCEO*, and in other laws), limits on the exercise of the judicial power of the bishop in his diocese (cf. c. 381 § 1). These limits can be of a substantive nature (the bishop cannot judge some types of causes, e.g., causes on nullity of the sacred ordination: c. 1709 § 1), subjective (he cannot judge some faithful who have their domicile in his diocese: c. 1405 § 1,1°), or functional (he cannot, for instance, establish tribunals—the jurisdiction of which come from the same bishop—before which judgments of the diocesan tribunal are challenged: cc. 1438–1439). The universal legislator has also reserved for himself normative power over almost every aspect of the process, prohibiting the dispensation of procedural law (c. 87 § 1) and attributing to the diverse particular legislators—diocesan bishops (c. 391), particular councils (c. 445), bishops' conferences (c. 455), etc.—a limited and very specific sphere of procedural subjects on which they can provide norms, among which titles of competence are not included.[8] Neither do the parties to the cause (cc. 1476–1480) possess any power to modify the legal

6. Cf. *Principles*, nos. 6 and 7; E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), pp. 471–473; J. LLOBELL, "Il 'petitum' e la 'causa petendi' nel contenzioso-amministrativo canonico. Profili sostanziali ricostruttivi alla luce della cost. ap. 'Pastor bonus,'" in *Ius Ecclesiae* 3 (1991), pp. 124–131.

7. C. DE DIEGO-LORA, *Poder jurisdiccional y función de justicia en la Iglesia* (Pamplona 1976), pp. 171–172.

8. Cf. *Principles*, no. 5; "Relatio Sabattani 1970," in *Comm.* 2 (1970), p. 183; J. LLOBELL, "Centralizzazione normativa processuale e modifica dei titoli di competenza nelle cause di nullità matrimoniale," in *Ius Ecclesiae* 3 (1991), pp. 431–477.

titles of competence. They may only choose from among the various options that, on some occasions, are offered by law; an option will be offered, therefore, only when law foresees two or more *concurrent fora.* In the *forum of the contract,* which does not apply *tout court* to marriage (c. 1673,1°), the parties may select the tribunal to decide that precise dispute because law so provides (c. 1411 § 1). As a result, the non-competent judge or tribunal *cannot* hear the cause for which it lacks competence, and it must reject *in limine litis* (at the beginning of the process) the plaintiff's petition (cc. 221 §§ 1 and 2, 1407 § 1, 1502, 1504,1°, 1505 §§ 1 and 2,1°). Although c. 221 includes in the protection of rights the processing of administrative recourses,[9] the provision regarding competence specifically concerns the exercise of judicial power. The summoning of the respondent by a non-competent tribunal does not correct the non-competence nor does it make the cause "belong" to that tribunal, that is, it does not create the *perpetuatio iurisdictionis* established in c. 1512,2°.

On the other hand, c. 1457 § 1 states: "Judges can be punished by the competent authority with the appropriate penalties, not excluding the loss of office ...; if, with no legal support, they declare themselves competent and hear and determine cases ..." From the text of the canon, we can infer several consequences useful for determining the concepts of jurisdiction and competence and the effects of the lack of both: a) the judgment pronounced by an non-competent judge *is a judgment,* because it is an act characteristic of a holder of jurisdiction, independent of any different effects that can derive from said judgment depending on whether it is a matter of absolute (cf. c. 1620,1°) or relative non-competence; b) relative non-competence does not cease to exist because of the act of giving a valid judgment, in that the sanction provided in c. 1457 § 1 applies to any judges who, being non-competent, (it does not matter whether it is absolute or relative non-competence), "hear and determine cases"; and c) the violation of the prohibition on judging when non-competent can entail various penalties, including loss of office.

3. *Assimilation of jurisdiction by competence*

The assimilation of jurisdiction by competence ("competence is the jurisdiction in particular"[10]) entails—especially in matrimonial causes—a certain legislative ambiguity when regulating the phenomena of lack of jurisdiction or competence, which ambiguity—when detected—has been justified by doctrine and jurisprudence.[11] The resolution of a dispute by

9. Cf. S. BERLINGÒ, "Il diritto al 'processo' (can. 221 §2 CIC) in alcune procedure particolari," in *Fidelium Iura* 3 (1993), pp. 339–358.
10. J. OCHOA, "I titoli di competenza," in P.A. Bonnet–C. Gullo (Eds.) *Il processo matrimoniale canonico*, cit., pp. 135–139.
11. Cf. J. LLOBELL, "Centralizzazione normativa processuale...," cit., pp. 464–465 and 469–475.

one who lacks jurisdiction *does not judge* anything, in the technical sense of the term *to judge*. The act containing that decision, regardless of whether or not it has any juridical value, cannot be only an irremediably null judgment (c. 1620), because *it is not a judgment*; it is the phenomenon foreseen in c. 1406 § 1, when the person to whom said decision falls is the Roman Pontiff, because in the Church there is no one who has jurisdiction over him. As a result, this eventual decision (*not* judgment) "*pro infectis habetur*"; that is, lacking the jurisdiction, the decision cannot be described as a judgment, because "it is considered nonexistent," according to the Spanish version of the *CIC* ("si ritiene come non fatta," according to the Italian version of the *EV*). Nevertheless, the same *CIC* offers a noteworthy example of the confusion between the lack of jurisdiction and of competence: c. 1620,2° sanctions with irremediable nullity the *judgment* "given by a person who has no power to judge in the tribunal in which the case was decided." The phenomenon, which was not foreseen in c. 1892 of the *CIC*/1917, tries to resolve some juridically aberrant situations, such as a *judgment* pronounced by the defender of the bond,[12] who is a mere (public) party in the process. From a uniform application of the principle that is the basis for the norm of c. 1406 § 1, it seems obvious that the decision described in c. 1620,2° is not an irremediably null judgment, but a nonexistent one.[13] Otherwise, were it really a judgment (albeit null), the decision of a person lacking the power of jurisdiction could have various juridical effects, especially once the ten years indicated in c. 1621 lapse.

Nevertheless, a non-competent judge does possess jurisdiction, because *he is a judge*. Therefore, the decision by which he rejects the petition because he believes himself to be non-competent, ex officio or at the instance of the respondent, is a judicial decree comparable to a definitive judgment, against which there is the right to appeal (cf. cc. 1505 § 1 § 2,1° and § 4, 1618 and 1629,4° and cc. 1459–1461). The judgment of an absolutely non-competent judge is irremediably null, but *it is a judgment*.

III. CONCEPT OF *FORUM*, CLASSIFICATION OF *COMPETENT FORA*, AND THE *PRIVILEGE OF THE FORUM*

1. *Concept of the forum*

The provisions of procedural law refer only to the external forum, even if they possess obvious effects on the internal forum (sacrament and conscience).[14] In a broad sense, the *forum* can be defined as the (individual

12. Cf. sentence *coram* FILIPIAK (with a panel of five judges), February 15, 1967, in *SRR Dec* 59 (1967), pp. 106–110, no. 2.
13. Cf. ibid.
14. Cf. *Principles*, no. 2; see introduction to tit.1 of "Matrimonial Processes."

or collegial) organ possessing jurisdiction. Therefore, forum is a synonym of *judge* and of *tribunal*, in that it does not matter if the power of those organs is ordinary (proper or vicarious) or delegated (*a iure*, by legal provision, or *ab homine*, by title to proper ordinary power). The term *forum* comes from Roman law; the forum was the seat of public activity of the respective city or, in other words, the place where jurisdiction was exercised. Each judicial organ exercised its jurisdiction *in the forum* for which it possessed competence and in which it could lawfully exercise the jurisdiction with which it had been vested.[15]

Because of that historical relationship between the forum and the place in which the tribunal possesses competence, the forum is also identified with the legal *title* that attributes a given sphere of competence to each judge or tribunal, usually according to territorial criteria from the domicile (in a broad sense) of the parties or the place where the object of the dispute is found (also in a broad sense). As a result, in a strict sense, the study of the forum relates to competence and presupposes jurisdiction, except in the *privilege of forum*. Often doctrine studies the types of *fora* (their classification) when discussing the various titles of relative competence.[16] Nevertheless, the diversity of fora also applies to some titles of absolute competence; therefore, it is appropriate to differentiate the study of the types of fora and of competence.[17]

2. *Classification of competent fora*

a) *Legal and conventional fora*

In the current canonical code, all the canonical fora are *legal*. Also, the tribunal designated by the parties to settle a dispute arising from a contract cannot be considered *conventional* (c. 1411 § 1), because that designation is possible only because law so states and therefore, it is a *legal* forum. In short, the *general forum* of the domicile or quasi-domicile of the respondent (c. 1408) and the various fora we call *special* come from free acts of a party (e.g., the determination of the domicile or quasi-domicile)—or of both parties in the forum of the contract (see c. 1411 § 1)—upon which law confers the capacity to determine the competent tribunal. The process is a public institution, the regulation of which has been reserved to himself by the universal legislator. The former theories that considered the process to be a private institution similar to the

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15. Cf. F. ROBERTI, *De processibus*, I, 2nd ed. (Rome 1941), no. 166, pp. 481–482.
16. Cf. M. CABREROS DE ANTA, *Comentarios al Código de Derecho Canónico*, III (Madrid 1964), pp. 218 and 222–227; F. ROBERTI, *De processibus*, cit., no. 64, pp. 187–189.
17. Cf. other recent formulations in M.J. ARROBA, *Diritto processuale canonico* (Rome 1993), pp. 79–104; P.A. BONNET, "Les jugements en général," in *Le Nouveau Droit Ecclésial. Commentaire du Code de Droit Canonique*, Paris, at press, ch. 2.

contract or quasi-contract have been completely left behind, by which the parties conferred jurisdiction by submitting to the organ determined by them in that private convention.[18] Since the *CIC*/1917, the organs capable of settling a dispute because the parties have granted them that faculty (the arbiters) do not possess any share in the ecclesiastical jurisdiction (ordinary or delegated) and, as a result, neither can they have judicial competence. Arbitral decisions are not judgments, even if the *CIC* uses by analogy the terms *trial* and *judgment* (cc. 1714 and 1716). Arbitration and compromise are juridical institutions established precisely *in order to avoid the exercise of jurisdiction* (in order to "avoid trials," as indicated in the heading of the title preceding cc. 1713–1716) in disputes the subject of which is the free disposition for the parties, and in which they do not belong (in full or part) to the public good (c. 1715 § 1). Because these institutions do not involve any modification of the common system of attribution of competence, c. 1714 grants decentralization of the provisions over them.

b) *Personal and real fora*

Every subject is a holder of a juridical patrimony consisting of various assets, the first of which is the very existence of the entitlement: the "right to physical or juridical life." Such a subject may consider that he or she has suffered unjust damage caused by another subject who is also subject to the canonical system, in any of the assets constituting the patrimony of the one who holds it (cf. cc. 1476, 1480, 310). Said subjects (the parties to the process or their representatives) can usually be locatable at some domicile (in a broad sense). That domicile originates the *personal* forum. On the other hand, the allegedly damaged asset is the object of the dispute that must be settled by the judge. That asset—which is substantially transformed into the *petitum*, although for the procedural identification of the dispute, the *petitum* must be integrated with the *causa petendi* and with the parties (c. 1641,1°)—is considered a *thing* (*res* in Latin), even if it is of a spiritual nature,[19] and it gives place to the *real* forum.

The canonical system must continue to assimilate and develop (through normative and, especially, applicable provisions) the conciliation principle according to which the pastoral action of the Church demands personal criteria for determining the jurisdictional structures for performing certain pastoral tasks, or for care of the faithful who are found in situations in which the territorial exercise of jurisdiction is insufficient.[20] The importance of those tasks or the care of said faithful has led the Holy See to erect some secular jurisdictional structures,[21] the judicial power of which (cf. c. 135 § 1) is exercised, within the sphere of proper

18. Cf. F. ROBERTI, *De processibus*, cit., no. 61, pp. 176–178.
19. Cf. J. OCHOA, "I titoli di competenza," cit., p. 149, note 36.
20. Cf. *PO* 10 §2; *CIC, Preface*, in *AAS* 75 [1983 (2nd part)], pp. XXII–XXIII and cc. 294–297; *Communionis notio*, 16a; *Principles*, no. 8.

competence, according to the procedural norms of common law (cc. 135 § 3, 1402). Although these norms involve the territorial exercise of jurisdiction,[22] they nonetheless need to be adapted to the personal nature of said structures, according to the criteria for interpretation of law for parallel locations and for similar cases (cc. 17 and 19), and according to the norms of particular law (c. 20).[23]

c) *General and specific fora*

Every juridical asset has a holder: public or private, natural person (born or unborn, baptized or non-baptized) or *juridical* person (recognized or not recognized by the competent authority). Since Roman law (*C* 3, 13, 2), it has been claimed that the general principle of assignment of competence is "actor forum rei sequitur"; here *rei* does not mean *thing*, but *respondent* (from the Latin *reus*). Therefore, the one (plaintiff) who believes that another (respondent) has caused damage can normally turn to the personal forum of the respondent (to the place of his or her domicile or quasi-domicile); this is the *general* forum provided in cc. 1407 § 3 and 1408. When law determines another forum different from the general forum, we have a *special* forum that nonetheless will not always be real.

d) *Concurrent (or optional), necessary (or exclusive), and subsidiary fora*

The existence of the general and special fora involves the possible plurality of competent fora. If in fact there is more than one forum that is truly competent (because the legislator has so determined), each one will be a forum *concurrent* with the rest, and the plaintiff may select the one he or she prefers. Therefore, the concurrent forum is also called the *optional* forum. However, on some occasions, the special forum derogates the general forum; the derogating forum constitutes a *necessary* forum, which is also called the *sole* or *exclusive* forum.[24] This exclusivity creates for the other tribunals of equal grade a (material or subjective) noncompetence that is usually absolute, but that also can be relative (see commentary on c. 1411). There are also fora that have the objective of guaranteeing the exercise of the right to jurisdictional protection (c. 221 § 1) when there is not (or it is not known of after due diligence) any general or special forum. It is the case of the fora of the *vagus* (c. 1409 § 1) and of the plaintiff (c. 1409 § 2) which we call *subsidiary* because they confer competence only because of a lack of general and special fora. As a

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21. Cf. JOHN PAUL II, Ap. Const. *Ut sit*, November 28, 1982, in *AAS* 75 (1983), pp. 423–425; SMC; SCB, Decl. *Praelaturae personales*, August 23, 1982, in *AAS* 75 (1983), pp. 464–46

22. Cf. P.A. BONNET, "I tribunali nella loro diversità di grado e di specie," in P.A. BONNET–C. GULLO (Eds.) *Il processo matrimoniale canonico*, cit., pp. 188–189.

23. Cf. C.J. ERRÁZURIZ, "Circa l'equiparazione quale uso dell'analogia in diritto canonico," in *Ius Ecclesiae* 4 (1992), pp. 215–224; idem, "Ancora sull'equiparazione in diritto canonico: il caso delle prelature personali," in *Ius Ecclesiae* 5 (1993), pp. 633–642.

24. Cf. L. DEL AMO, commentary on the title "De foro competenti," in *CIC Pamplona.*

result, the subsidiary forum cannot involve the *concurrence* of fora (in matrimonial causes, see c. 1673,3°).

e) *Delegate and ordinary fora*

Inasmuch as the forum is the share in ecclesiastical jurisdiction, there are *ordinary* and *delegate* fora (c. 131 § 1); both can be individual or collegial. All holders of an ecclesiastical office having proper ordinary power of governance in a strict sense—not the parish priest, for instance (c. 515 § 1)—possess executive (administrative), legislative, and judicial (jurisdictional) power with regard to persons, places, and things subject to that power, except the supreme power of the Roman Pontiff (c. 331), which creates limits on the various spheres of the power of the other proper ordinaries (c. 381). The proper ordinary, therefore, is, individually and in the proper see (cc. 1468 and 1469), the judge of all disputes of the respondent parties subject to his power (cc. 134 § 1, 331, 381, 391, 1417 § 1, 1419 § 1), with the exception indicated in c. 1427 and that of the material and subjective reserves. For various reasons—time availability, technical background, avoiding for the proper pastor of the community the duty to intervene in intrinsically conflictive situations, etc.—the law recommends that the judicial power be exercised through vicarious or delegate judges, without the proper ordinary losing the ability to personally judge, except when he himself is a representative of one of the parties to the dispute (c. 1419 § 2).[25] The obligation of the diocesan bishop to constitute a tribunal (cc. 1420 § 1, 1421 § 1) must be reconciled with the statement that the bishop is the proper judge of the diocese (cc. 391 § 2 and 1419 § 1), which power devolves upon him by divine law.[26] The exercise of this power is subject to the *norms of law*, which allow the bishop the actual *personal* exercise of this power, and not just through the judicial vicar and the other judges. That is, positive law provides for an exemption from the collegial exercise of judicial power (without prohibiting it) when the one judging is the diocesan bishop (cc. 391 § 2 and 1419 § 1). As a result, the *ordinary forum* is, simultaneously, the proper ordinary and his vicarious tribunal (before a sole judge or before a college: c. 1425 §§ 1 and 2). The *delegate forum* is the judge or tribunal to whom the proper ordinary delegates or commissions a cause (from the Latin *committere, commissio*).[27] Inasmuch as the judicial power can only be delegated by the proper ordinary—not the vicar—(cc. 87 § 1, 134 and 135[28]), judicial subdelegation by those holding delegate power is impossible, except in the case of pontifical dispensation.

25. P.A. BONNET, "I tribunali nella loro diversità di grado e di specie," cit., pp. 189–190.
26. Cf. *CD* 8, a), 11; cc. 375, 381.
27. Cf. c. 1444 §2; *PB* 124,2°; 129 §1,4°.
28. Cf. *Comm.* 10 (1978), p. 243.

3. *The privilege of the forum, the reservation of jurisdiction, and the reasons for a mixed forum*

The *privilege of the forum* means that the holder thereof is exempt from any other jurisdiction that is not ecclesiastical. Although historically the issue is much more complex,[29] lately the privilege of the forum has usually referred to the fact that clerics are not subject to the jurisdiction of state tribunals, especially in penal causes (cf. cc. 120 and 2341 of *CIC*/1917). At present, the Church has renounced this privilege in the latest agreements entered into with Spain (July 28, 1976, art. 2) with Colombia (July 12, 1973, art. 20) and with Italy (February 18, 1984, no. 2, b),[30] recognizing the jurisdiction of civil courts over all citizens of the respective State, regardless of their canonical status. A different issue is that of *reservation of jurisdiction*; that is, exclusivity of ecclesiastical jurisdiction over some subject areas, for example over the validity of a sacrament (see commentary on cc. 1401 and 1671). There is a *mixed forum* in those disputes in which the jurisdiction belongs to the Church as well as to the State.[31] The elimination through *prevention* (see commentary on c. 1415) in mixed forum causes (c. 1553 § 2 *CIC*/1917) does not imply the nonexistence of matters subject to ecclesiastical and civil jurisdiction; this nonexistence is impossible if one considers how Catholics and the ecclesial structures, which possess (or may possess) civil juridical personality, belong to both systems. The consultors who reviewed the *Schema* of 1976 of the *CIC* defended the existence of mixed forum causes against those who denied jurisdiction for the Church over assets subject also to State jurisdiction, and on the other hand, found the procedural institution of intersystem prevention anachronistic (at least at the universal legislation level).[32]

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29. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, I (Rome 1938), pp. 81–91; F. ROBERTI, *De processibus*, cit., nos. 51–55, pp. 138–154.

30. Cf. *Concordato entre la Santa Sede y la República de Colombia*, July 12, 1975, a. 8, in *AAS* 67 (1975), pp. 421–434; *Acuerdo entre la Santa Sede y el Estado Español sobre asuntos jurídicos*, January 3, 1979, a. 6,2°, in *AAS* 72 (1980), pp. 29–36; *Accordo tra la Santa Sede e la Repubblica Italiana che apporta modifiche al Concordato Lateranense*, a. 8,2° and *Protocollo addizionale*, no. 4, February 18, 1984, in *AAS* 77 (1985), pp. 521–535.

31. Cf. F. ROBERTI, *De processibus*, cit., no. 56, pp. 155–157.

32. Cf. *Comm.* 10 (1978), p. 218. See commentaries on cc. 1405 §1, 1671 and 1672; in a different sense, J.L. ACEBAL LUJÁN, commentary on c. 1401, in *CIC Salamanca*. Cf. F. FINOCCHIARO, "Giurisdizione dello Stato e giurisdizione ecclesiastica nell'esperienza giuridica," in *Rivista di Diritto Processuale* 48 (1993), pp. 988–993.

IV. DISTINCTION BETWEEN ABSOLUTE COMPETENCE AND RELATIVE COMPETENCE AND THE DETERMINING CRITERIA FOR RELATIVE COMPETENCE

1. *Distinction between relative and absolute competence*

Every (ordinary or delegate) judge possesses jurisdiction; no judge, except the Roman Pontiff (cc. 331 and 1417), always possesses competence. While in the sacramental internal forum, all Cardinals and bishops are usually holders of the power to "hear confessions ... everywhere" (c. 967 § 1), in the judicial (external) forum, only those who receive an office—or a delegation (commission)—that involves jurisdiction have power, according to the criteria established by the Roman Pontiff in procedural law (*CIC*, norms of the tribunals of the Apostolic See, etc.). These criteria do not allow dispensation (c. 87 § 1) or the activity of various particular legislators (c. 1402), except for a few secondary exceptions.[33] Therefore, the various proper ordinaries and other judges are only competent to judge causes that law (or the act of delegation) confers upon them, in their respective sees (cc. 1468 and 1469) and according to the method also determined by the same law: "*ad normam iuris*" (cc. 135 § 3 and 221 § 1). The Apostolic Signature has declared on various occasions that, without the approval of this Signature (c. 1445 § 3,2°; *PB* 124, 2°–4°), no diocesan bishop has power to entrust a cause to the tribunal of another diocese—even with the consent of the *ad quem* bishop and thus modifying the legal criteria on competence[34]—and that the holders of the vicarious or delegate power—the same as the parties—do not have any availability over the titles of competence.[35]

Although we have defined competence as the standing of a judge or tribunal to decide a cause, and considering that we have sufficiently proven that this standing can only come from the norms of the Holy See, it is necessary, then, to study those provisions and the criteria justifying them. Common doctrine identifies the concept of competence with the justification thereof and defines competence as "the portion of the jurisdiction assigned to each judge."[36] In fact, it is merely highlighting the

33. See note 8.

34. Cf. Signatura, Decr., June 22, 1989, in "Decreti sulla commissione, la proroga e altre questioni riguardanti la competenza dei tribunali nelle cause di nullità matrimoniale," in *Ius Ecclesiae* 2 (1990), decree no. 8, p. 731.

35. Cf. Signatura, Decr., undated, in F. DANEELS, "Brevis introductio ad declarationem Supremi Signaturae Apostolicae Tribunalis de foro plerarumque probationum," in K. LÜDICKE-H. MUSSINGHOFF-H. SCHWENDENWEIN (Eds.), *"Iustus Iudex." Festgabe für Paul Wesemann zum 75. Geburtstag von seinen Freunden und Schülern* (Essen 1990), p. 411.

36. Cf., above all, F. ROBERTI, *De processibus*, cit., no. 60, p. 171.

cause (the distribution of jurisdiction between the various holders thereof)[37] or the effect (the standing of a given tribunal to judge a cause). The second option stresses the fundamental obligation of the tribunals and of the parties to respect the titles of competence established by the legislator (c. 221 § 1). The criteria used for that distribution of jurisdiction are of various types. Some derive mainly and directly from the "constitutive principles of the process": right to defense, independence of the judge, *favor veritatis*, multiplicity of instances, etc.[38]; others come from "reasons of mere advisability" that, in any case, do not detract from the public nature of the process, because they belong to the essence of a public institution to protect rights (cc. 221 and 1407 § 1). From this double (always public) nature of the criteria used to individualize and determine the competence assigned to each tribunal derives, in turn, a differentiated protection of titles of competence. If violation of the title of competence directly involves nullity of the judgment, it is because the title has been included by the legislator among those of *absolute* competence (cc. 1406 § 2, 1440, 1461, 1620,1°); if the violation of the title of competence is protected by other means, but not with immediate and irremediable nullity of the judgment, it is *relative* non-competence, which places the tribunal in an unlawful situation (cc. 221 § 1, 1407 §§ 1 and 2, 1457 § 1, 1460, 1488 § 2, 1505 § 2,1°). Protection of absolute competence (through exceptions and nullity of the judgment) is cumulative with the means of protection of relative competence through personal sanctions on a non-competent judge who pronounces a judgment (it does not matter if it is valid or null).

2. *Criteria that determine relative competence*

The criteria determining relative competence include:

a) providing the defense of the respondent and bringing him or her to the tribunal before which he or she may be summoned. As a result, the general principle of attribution of competence is what is indicated in c. 1407 § 3, which constitutes the general forum;

b) providing the tribunal with immediate knowledge of the evidence necessary to know the facts of the dispute that it must judge and simplifying for the parties the presentation of that evidence while applying the

37. Cf. J.L. Acebal Luján, commentary on cc. 1404–1416, in *CIC Salamanca*; M.J. Arroba, *Diritto processuale canonico*, cit., pp. 79–80; M. Cabreros de Anta, *Comentarios al Código de Derecho Canónico*, cit., p. 218.

38. Cf. J.L. Acebal Luján, "Principios inspiradores del derecho procesal canónico," in J. Manzanares (Ed.), *Cuestiones básicas de derecho procesal canónico* (Salamanca 1993), pp. 13–41; P.A. Bonnet, "Processo. 13) Processo canonico: profili generali," in *Enciclopedia giuridica*, XXIV (Rome 1991), pp. 1–23; J. Goti Ordeñana, "Principios rectores del proceso canónico y orientaciones en el esquema de reforma," in *Estudios de Derecho Canónico y Derecho Eclesiástico en homenaje al profesor Maldonado* (Madrid 1983), pp. 129–222.

principles of *favor veritatis* and procedural economy—that is why the *counterclaim* constitutes a legal title of relative competence (cc. 1495 and 1463 § 2);

c) making the jurisdiction of the tribunal coincide with that of the holder of the executive power to which the parties are subject or with the object of the dispute, manifesting the unity of the various powers in the person of the proper ordinary, and facilitating execution of the judgment;

d) distributing the judicial work between the various tribunals of equal status.

These criteria are manifested in a *territorial* distribution of jurisdiction, with territoriality constituting the characteristic of relative competence, although we shall see that territoriality also has effects on absolute competence. Doctrine usually designates this *horizontal*territorial distribution of jurisdiction to mean the *material identity* of competence—on the same factual phenomena (in abstract) and at the same grade of instance—of tribunals of different jurisdictional structures that, normally, are determined according to territorial criteria. Therefore, when a tribunal of the first instance is non-competent only for territorial reasons, its non-competence is relative. Canon 1407 § 1 indicates that titles of relative competence are those defined in cc. 1408–1414; cc. 1673 and 1694 also confer relative competence, except in phenomena reserved for the Apostolic See.

In secular *personal* jurisdictional structures—such as military ordinariates[39] or personal prelatures—the key office possesses a jurisdiction the juridical nature (proper ordinary) of which is identical to that which is possessed by key offices of the territorial jurisdictional structures. The specificity of the criterion of incorporation into that division and of the scope of jurisdiction does not alter the nature of the division nor of the power of its key office: ordinary, proper, and secular. Therefore, in areas in which the proper ordinary possesses jurisdiction, his competence (and that of his tribunals) is determined by the general titles of judicial competence (cc. 1407–1414, etc.). The criterion of subordination of this jurisdictional structure can be equivalent to the domicile of the respective party in the process for litigation on questions of jurisdiction of the proper ordinary. On the other hand, these personal ordinaries possess territorial jurisdiction in some places; in this case, the general criteria of competence are applied directly, without appealing to the comparison between their jurisdiction and that of the local ordinaries. Titles of competence are concurrent when there are other competent tribunals for the respective processes.

39. Cf. SMC, 14.

V. DIFFERENT TYPES OF ABSOLUTE COMPETENCE

The rules revealed by tradition and set forth by the current code for establishing the *absolute titles of competence* meet very heterogeneous needs. It is more illuminating to individualize these rules when describing each of the titles: material, subjective, ritual, and functional. In contrast to the *horizontal* characteristic of relative competence, the *vertical* nature of absolute competence is attributed as a common denominator of the titles of absolute competence. This vertical nature means that absolute competence dispenses with territorial reasons, which are considered horizontal and typical of relative competence, although territoriality also influences absolute non-competence due to the grade of the instance and of the tribunal.

1. *Material competence*

Material competence is that which belongs to a tribunal because of the object of the dispute, thus dispensing with the place where said object can be located, the domicile (*lato sensu*), the subjective status of the parties, and the grade or instance of the trial. This competence comes from the *reservation* made in favor of the tribunal by law (with the note of generality) or by holders of proper ordinary power (with a general or *ad casum* nature).

a) *Reservation of certain cases to the authority of the Pontiff*

The pontifical reservation excludes some types of causes of competence originating from proper ordinary judges (and from their tribunals), in favor of another tribunal (normally of the Roman Curia). This reservation can be *ad casum* (see cc. 1405 § 1,4° and 1417) or general (legal). The pontifical reservation is *legislative* in the following situations:

— In the administrative-contentious process: only administrative tribunals can judge the acts of the public administration (c. 1400 § 2). At present the only administrative tribunal is the Apostolic Signature (c. 1445 § 2 and *PB* 123).

— *Pastor bonus* 52 attributes to the CDF competence over “crimes against the faith and the graver crimes committed either against customs or on the occasion of the celebration of the sacraments.” RGCR article 128 § 2 indicates that it is an “exclusive” competence. Inasmuch as the RGCR is not a normative act of the Roman Pontiff, nor has it been specifically approved (as provided in article 125 § 2 of the same RGCR), it is evident that the material reservation indicated in favor of the CDF can only declare the situation provided by various proper norms of that Congregation, in force pursuant to c. 20 and *Pastor bonus* 52.[40] Not all those norms have been

40. Cf. *PB* 2 §1, 18/b. See commentary on c. 1412.

promulgated through their publication in *AAS* (c. 8 § 1) because they have been transmitted as reserved for the interested proper ordinaries (c. 8 § 2). So, when judging crimes against the faith or those committed on the occasion of the celebration of the sacraments, those upon whom it devolves to bring the penal action (c. 1721) and the tribunals before which the cases are exercised, must prove that said crime has not been reserved by the Roman Pontiff for the CDF (for the first or second instance) or that there are special norms on the procedure that must be followed.[41] In this context, doctrine refers to the process for judging the crime of solicitation "*ad turpia*" (c. 1387).[42]

— Causes of nullity of the sacred ordination are within the competence of the CDWDS (c. 1709 § 1 and *PB* 68). The judicial nature of these causes seems clearly affirmed by the *CIC* (cc. 1708–1712), although in the Roman Curia they are usually handled through administrative means.[43]

Among the procedural functions of the dicasteries of the Roman Curia, *Pastor bonus* includes the competence of the CDF over the "privilege-favor of the faith" (arts. 19 § 2 and 53), which is distinct from the "Pauline privilege" (cc. 1143–1150).[44] This competence is not *judicial* but *administrative,* because it does not protect a right or resolve any dispute; it is a matter of asking the Roman Pontiff for the granting of a grace. The same thing occurs with the dispensation of ratified and non-consummated marriages,[45] of the obligations derived from the sacrament of orders,[46] or with causes of canonization.[47]

41. Cf. PAUL VI, M.P *Integrae servandae*, December 7, 1965, nos. 3–8, in *AAS* 57 (1965), pp. 952–955; SCDF, *Agendi ratio in doctrinarum examine*, January 15, 1971, in *AAS* 63 (1971), pp. 234–236.

42. Cf. P. CERATO, *De delicto sollicitationis* (Padova 1922), pp. 93–112; F. ROBERTI, *De processibus*, cit., nos. 145–146, pp. 425–426. See commentary on c. 1412.

43. Cf. J. LLOBELL, "Centralizzazione normativa processuale...," cit., p. 436, note 19.

44. Cf. SCDF, *Instructio pro solutione matrimonii in favorem fidei* and *Normae procedurales pro conficiendo processu dissolutionis vinculi matrimonialis in favorem fidei*, December 6, 1973, in EV, IV, nos. 2730–2774; G. GIROTTI, "La procedura per lo scioglimento del matrimonio nella fattispecie del privilegio paolino,'" in *I procedimenti speciali nel diritto canonico* (Vatican City 1992), pp. 157–177; A. SILVESTRELLI, "Scioglimento di matrimonio in favorem fidei," in *I procedimenti speciali*..., cit., pp. 179–216.

45. Cf. cc. 1142, 1697–1706; *PB* 67; SCDS, Instr. *"Dispensationis matrimonii" de quibusdam emendationibus circa normas in processu super matrimonio rato et non consummato servandas*, March 7, 1972, in *AAS* 64 (1972), pp. 244–252; *Litterae circulares de processu super matrimonio rato et non consummato*, December 20,1986, in EV, X, nos. 1012–1044.

46. Cf. SECR. ST., Letter *Con riferimento al Prefetto della Congregazione del culto divino e della disciplina dei sacramenti sulla competenza di detta Congregazione nei casi di dispensa dagli obblighi assunti con l'ordinazione al diaconato e al presbiterato*, February 8, 1989, in EV, XI, no. 2140; E. COLAGIOVANNI, "Il procedimento di dispensa dagli oneri sacerdotali," in *I procedimenti speciali*..., cit., pp. 371–385.

47. Cf. c. 1403; DPM; *PB* 71; SCCS, Norms *Cum in constitutione apostolica*, February 7, 1983, in *AAS* 75 (1983), pp. 396–403; SCCS General Decr. *Circa servorum Dei causas*, February 7, 1983, ibid., pp. 403–404; SCCS *Regolamento della Sacra Congregazione per le cause dei santi*, March 21, 1983, in EV, S1, pp. 783–795.

b) *Reservation of certain cases to the authority of the diocesan bishop*

There is also a—general or *ad casum*—material reservation on the part of the holder of proper ordinary judicial power. This reservation involves the absolute non-competence of the respective vicarious tribunal. The bishop may make precise reservations—of a judicial nature—for a given cause, in detriment to the competence of his vicarious tribunal (cc. 391 § 2 and 1420 § 2), while always respecting the principle "semel iudex, semper iudex," except under the special circumstances foreseen in c. 1425 § 5. The diocesan bishop can also legislatively determine that a type of cause will be judged personally by him, making his tribunal materially non-competent (cc. 391 § 2 and 1420 § 2).

The *inter-diocesan tribunals* —vicars of each of the bishops that have constituted them (c. 1423 § 1)—can be erected only for some types of causes (c. 1423 § 2), for instance in the case of regional tribunals in Italy erected by Pius XI for causes of nullity of marriage.[48] In that case, the tribunals are also materially non-competent for causes that have not been entrusted to them when the tribunals were erected. Moreover, the moderator of an inter-diocesan tribunal can reserve any cause for itself, in advance, inasmuch as it possesses the same faculties as the bishop over his diocesan tribunal (c. 1423 § 1).

2. *Subjective competence*

Subjective competence belongs to a tribunal because of the reservation made in its favor, by reason of the juridical condition (ecclesiastical or civil) of the parties to the dispute, irrespective of the domicile (*lato sensu)* of that party. Canon 1405 reserves for the Roman Pontiff and the Roman Rota causes of the highest holders of ecclesiastical and civil power; this competence gives place to the so-called "major causes *a iure*."[49] Canon 1445 § 1,1° [sic] reserves for the Apostolic Signature causes "against Auditors of the Roman Rota by reason of things done in the exercise of their office"; in this way, the Signature is competent (absolutely, for subjective-objective reasons) in some causes of first instance on the merits of a dispute that, therefore, should be appealable.[50] The contentious (c. 1400 § 1,1°) or penal (c. 1400 § 1,2°) nature of the object of the dispute

48. Cf. PIUS XI, M.P. *Qua cura*, December 8, 1938, in *AAS* 30 (1938), pp. 410–413; J. LLOBELL, "Il tribunale di appello del Vicariato di Roma," in *Ius Ecclesiae* 1 (1989), pp. 274–277; idem, "Centralizzazione normativa processuale...," cit., pp. 462–464.

49. The non-reserved causes which the Roman Pontiff judges are termed "causas mayores *ab homine*" (cf. cc. 1405 §1,4°, 1444 §2; M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, cit., pp. 32–33 and 38).

50. Cf. NSSA, arts. 74–82; J. LLOBELL, "Il 'petitum' e la 'causa petendi' nel contenzioso-amministrativo canonico," cit., pp. 144–148; idem, "Note sull'impugnabilità delle decisioni della Segnatura Apostolica," in *Ius Ecclesiae* 5 (1993), pp. 684–698.

determines the competence over the bishops (c. 1405 § 1,3° and § 3,1°). For justification and application of subjective absolute competence see commentary on c. 1405.

Disputes with juridical persons represented by the diocesan bishop cannot be judged by the tribunal of the representative, regardless of whether this representative is the plaintiff or respondent, with the creation of subjective absolute non-competence to protect judicial independence (c. 1419 § 2).

3. *Ritual competence*

Ritual competence (*ratione ritus*) is the competence possessed by tribunals of the *Latin rite* in causes in which the respondent belongs to the Latin Church (c. 1476) and the tribunals of the Eastern Rite when the party is a member of that respective Church (c. 1134 *CCEO*). Aside from Eastern inter-ritual tribunals (c. 1068 *CCEO*)[51] and apostolic tribunals, which possess competence over the entire Church (Latin and Eastern), because they are vicars of the Roman Pontiff (*PB* 58 § 2), it seems consistent to state, pursuant to c. 1 of the *CIC* and of the *CCEO*, that the Latin tribunals do not have jurisdiction when both parties are Eastern Catholics, nor do the Eastern tribunals when the parties are Latin Catholics; that is, it would not be a legal reservation of *competence*, but a lack of *jurisdiction* for ecclesiological and historical reasons that determine the existence of the rites of the Church. Nevertheless, in practice and in doctrine one usually speaks only of *ratione ritus* or *non-competence*, which would be *relative* in disputes between persons of different rites who are judged by a (non-competent) tribunal of the rite of one of the parties. However, supposing that, when the tribunal belongs to a different rite than that of both parties, it is not a matter of lack of jurisdiction, but of authentic *non-competence*, then we believe that this non-competence should be considered *absolute*,[52] as occurs in the case of the exercise of jurisdiction "outside the territory." Canon 136 (which refers only to executive power) and canon 1469 § 1 of the *CIC* should be interpreted in the light of cc. 201 § 2 and 1637 of the *CIC*/1917.[53] Inter-ritual issues have considerable ecclesiological, conceptual, and

51. Cf. *SN*, cc. 39 §1 and 72 §1,6°; Z.M. BIEG, "Struttura e competenza dei tribunali territoriali e personali della Chiesa," in *Excerpta ex dissertatione ad Lauream in Utroque Jure in Pontificia Universitate Lateranensi* (Rome 1989), pp. 86–94.

52. Cf. CCEO cc. 986 and 1128; decree *coram* PALESTRO, December 18, 1989, in *Ius Ecclesiae* 5 (1993), pp. 197–205; P. GEFAELL, "L'ambito territoriale della giurisdizione dei Patriarchi Orientali. Riflessi sulla forma canonica," in *Ius Ecclesiae* 5 (1993), pp. 245–268.

53. Cf. *CIC* cc. 6 §2 and 21. The *CIC*/1917 decreed the nullity of procedural acts transacted outside of the territory (c. 201 §2), with the exceptions of c. 1637; cf. C. DE DIEGO-LORA, "La jurisdicción y su ejercicio 'extra-territorium': la nulidad procesal," in *Ius Canonicum* 10 (1970), pp. 465–528 and the sentence *coram* EWERS, February 4, 1967, studied there; M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, cit., pp. 268–272; F. ROBERTI, *De processibus*, cit., no. 167, pp. 482–485.

terminological difficulties that must be examined elsewhere, taking into account John Paul II's insistence that the Eastern and Latin systems should be considered as constituting the only *Corpus iuris Canonici*.[54] A similar issue, on the borderline between the lack of jurisdiction and of (absolute) competence, is raised with tribunals of clerical religious institutes of pontifical law (cc. 1427 and 1438,3°) in disputes in which one of the parties (or both) is not a member of the respective institute.

4. *Functional competence*

Functional competence comes from various consubstantial demands on the dynamics of the process, the violation of which involves irremediable nullity of the judgment. While the three preceding types of absolute non-competence (material, subjective, and ritual) come from *static* criteria of the canonical procedural organization, prior to the initiation of the cause, functional competence is intended to protect the proper development of the process, that is, its *dynamic* aspect. The dynamic of the process implies that some competent tribunals—in that they are concurrent fora—before initiating the instance (cc. 1512 and 1517), become absolutely non-competent after the summons of the respondent and, inversely, that other tribunals that were non-competent (even absolutely) become competent to judge the definitive judgment of another tribunal at the second instance. Functional competence considered in this way is a broad but not ambiguous concept,[55] apt for justifying various criteria of attribution of absolute competence.

a) *Competence by the grade of judgment*

This type of competence comes from the principle of multiplicity of instances (cc. 1440, 1644, 1646 § 2). The canonical system—like any other just system, in that human judgments are fallible—grants the guarantee of the right, as a minimum, to two judicial decisions from different tribunals on the basis of the same dispute (the dispute in which the parties, the *petitum* and the *causa petendi* coincide[56]). That is, the definitive judgment of first instance (cc. 1607 and 1618) can be appealed before the tribunal that is higher than the one that pronounced it. This right is considered by doctrine to be derived from natural law[57] and is protected—at a fundamental

54. Cf. JOHN PAUL II, *Discurso al Sínodo de los Obispos en la presentación del «Codex Canonum Ecclesiarum Orientalium»*, October 25, 1990, no. 8, in *AAS*, 83 (1991), p. 490; idem, *Discorso al Simposio internazionale di Diritto Canonico organizzato dal Pontificio Consiglio per l'interpretazione dei Testi Legislativi*, April 24, 1993, no. 3, in *AAS* 86 (1994), pp. 244–248.
55. Cf. M. CABREROS DE ANTA, *Comentarios al Código de Derecho Canónico*, cit., p. 220, note 3.
56. Cf. c. 1641,1°; J. LLOBELL, "Note sulla congruenza e la conformità delle sentenze di nullità del matrimonio," in *Ius Ecclesiae* 2 (1990), pp. 543–564.
57. Cf. F. ROBERTI, *De processibus*, cit., no. 62, p. 179.

level—by c. 221.[58] There is no right to appeal a judgment of first instance pronounced by the Roman Pontiff (cc. 333 § 3 and 1629,1°). Nevertheless, it is possible to appeal before another panel of the Apostolic Signature against some judgments of first instance pronounced by another panel of the Supreme Tribunal on the merits of the dispute.[59]

The gradation of the instances involves that of the tribunals, inasmuch as the exercise of the right to review on the merits of the judgment (cc. 1639 § 1, 1644 § 1 and 1648) must be orderly and effective. As a result, in view of the possibility of second, third, and subsequent instances (cc. 1438, 1439, 1444 § 1,2°), there are tribunals that are competent to judge them, although the grade of the instance does not always coincide with the grade of the tribunal. In fact, as an exception (cc. 1639 § 1 and 1683), a tribunal of the second instance (of appeals, *stricto sensu*) or of a higher instance can be competent to also judge at the first instance (pronouncing the first judgment on that dispute), with the resulting difference between successive instances of the trial and of the tribunal that hears it (the tribunal of third instance will judge the cause at the second grade, etc.).

The bishop (as any other holder of proper ordinary power of the secular jurisdiction) cannot establish in the diocese a tribunal of appeals for the tribunal of the first instance. This prohibition comes from ecclesiastical law and from the pontifical legislative reserve that forces an appeal pursuant to cc. 1438–1441 and 1444. Formerly there were tribunals of the first instance that were lower than the diocesan bishop (e.g., that of the archdeacon), the judgments of which could be appealed to the tribunal of the bishop. The Council of Trent reserved the competence for causes of nullity of marriage for the tribunal of the bishop.[60]

Except in causes in which the material or subjective competence has been the object of a pontifical legal reserve and in those other causes taken over by the Holy See (cc. 1405 § 1,4° and 1417), the second instance always originates a concurrent forum, inasmuch as every non-vicarious tribunal of the first instance of the Roman Pontiff—the so-called lower or outlying tribunals—must possess a likewise-outlying appeals tribunal (cc. 1438 and 1439).[61] The Roman Rota is the universal appeals tribunal

58. Cf. M.J. ARROBA, *Diritto processuale canonico*, cit., p. 119.

59. Cf. NSSA, arts. 58 §2, 77 and 82; J. LLOBELL, "Note sull'impugnabilità delle decisioni della Segnatura Apostolica," cit., *passim*.

60. Cf. COUNCIL OF TRENT, *sess.* 24, November 11, 1563: *Doctrina de sacramento matrimonii, Decretum de reformatione*, c. 20, in ISTITUTO PER LE SCIENZE RELIGIOSE (Ed.), *Conciliorum Oecumenicorum Decreta*, bilingual ed. (Bologna 1991), pp. 772–773.

61. The sentences of the different tribunals of first instance of the Vicariate of Rome can be appealed before the appellate tribunal of the same Vicariate: cf. JOHN PAUL II, M.P. *Sollicita cura*, December 26, 1987, in *AAS* 80 (1988), 121–124; J. LLOBELL, "Il tribunale di appello del Vicariato di Roma," cit. Nevertheless, the sentences of the diocesan tribunal of the State of Vatican City can only be appealed before the Roman Rota: cf. JOHN PAUL II, M.P. *Quo civium iura*, November 21, 1987, a. 8, in *AAS* 79 (1987), pp. 1353–1355.

for this second instance as well as for the third or subsequent instance (cc. 1443 and 1444 § 1; *PB* 126 and 128). The current norms of the Rota of the Nunciature in Spain confirm the exercise of that right.[62]

Non-competence due to the grade of trial is absolute (c. 1440). This non-competence occurs in an ascending and a descending direction: a tribunal of only the first instance is non-competent to judge at the second grade, just as a tribunal of only the second instance (e.g., the appeals tribunal of the Vicariate of Rome) is non-competent to judge at the first grade, except in the situation of c. 1683. We say "only" because there are local tribunals that possess competence for both instances on different causes (c. 1438,1° and 2°): in principle, the metropolitan tribunal is competent at the first instance for causes of the archdiocese (with territorial competence) and at the second instance for the judgments of the tribunals of the suffragan dioceses (with functional competence according to the grade of the trial).

Absolute non-competence due to the grade of the trial not only comes from the asymmetry described between the grade of the trial (second grade) and of the tribunal pronouncing it (first instance). In fact, territoriality acquires invalidating relevance in the judgment of the second grade pronounced by a *symmetric* tribunal (it is of the second instance and judges at the second grade) but non-competent according to the criteria indicated precisely by cc. 1438 and 1439, which are of a territorial nature. Canon 1440 states that "if competence by reason of the grade of trial ... is not observed, then the non-competence of the judge is absolute," which could allow an affirmation of relativity of the non-competence of a tribunal of the second instance to judge at the second grade the judgment of a tribunal when it is not a higher tribunal. This canon also indicates that this absolute non-competence takes effect because of a violation of the criteria for competence established in cc. 1438 and 1439, which only determine—at the outlyinglevel—the tribunal of second instance of each tribunal of first instance.

In the documentary process on the validity of the matrimonial bond, the tribunal of the second instance—which can be a sole judge (cc. 1425 § 1 and 1688)can make no other decision than to either uphold the judgment *pro nullitate* of first instance or send the cause to the tribunal of first instance in order that it proceed through ordinary channels (at the first instance), with the appellate judge being non-competent to rule at the first grade through ordinary channels. This non-competence will be absolute

62. JOHN PAUL II, M.P. *Nuntiaturae Apostolicae in Hispania*, October 2, 1999: *AAS* 92 (2000), pp. 5–17, arts. 28, 33, 38, 40. Cf. also SRR, *Decreto particular*, October 19, 1953, in X. OCHOA, *Leges Ecclesiae post Codicem Iuris Canonici editae*, III, no. 2375n; SCNE, *Carta al Presidente del S. Tribunal de la Signatura Apostólica*, January 22, 1954, ibid., no. 2414n; J. LLOBELL, "La necessità della doppia sentenza conforme e 'l'appello automatico' ex can. 1682 costituiscono un gravame? Sul diritto di appello presso la Rota Romana," in *Ius Ecclesiae* 5 (1993), pp. 602–609.

only if the second tribunal has competence exclusively for the appeal, not if, together with the appeal, it can judge at the first instance causes that belong to it (c. 1438,1° and 2°).[63]

b) *Competence derived from the principle* ne bis in idem

Each single dispute is identified, as we have seen: 1) by the asset that the plaintiff believes has been damaged by the respondent (the *petitum*), 2) by the concrete damage caused to that asset (the *causa petendi*), and 3) by the identity of the parties (c. 1641,1°). The principle of dual grade of jurisdiction entails the right of the parties to have each dispute be judged by two different tribunals, of which the second must be the appeals tribunal with regard to the first. Therefore, the principle *ne bis in idem* (there cannot be two decisions on the same cause) does not mean a prohibition on the right to appeal, but rather involves the exclusion of two judgments from the same grade on the same dispute. This criterion of competence creates the absolute non-competence of the tribunals of the same grade as the one that pronounced the judgment that one wishes to appeal. In addition to the non-competencies that the principle *ne bis in idem* creates at the seat of the appeal (c. 1440), it is worth indicating others that come directly from that principle:

— Once a valid judgment is pronounced at the first instance (cf. cc. 1621 and 1624), no other tribunal of the first instance can again judge that dispute (if it is identical, according to the criteria of c. 1641,1°), even if the plaintiff had been able to present the cause at the first instance before that other tribunal of first instance, concurrent (*a priori*) with the one before the one where in fact the petition was presented. If this irregularity should occur, it would be a matter of absolute non-competence because of the grade of the trial: a tribunal of the first instance would judge at the second grade. Something else occurs at the second instance with the concurrent tribunals of the same grade: it is not possible to pronounce two judgments of appeal on the same cause, but it is only possible to challenge the only judgment possible of the second instance before a tribunal of the third instance (in principle, before the Roman Rota), when law grants the possibility of the third grade.[64] These basic concepts of procedural law are ignored with some frequency in judicial practice; therefore, the Apostolic Signature has found it appropriate to recall them.[65] Nevertheless, the same tribunal of first instance can judge on the same *petitum* between the same parties when the *causa petendi* changes, because it is a different cause protected by a new action and a new claim that, therefore, cannot give a judgment conforming with the preceding one, for the

63. Cf. *Comm.* 11 (1979), p. 270.

64. Cf. cc. 1644 and 1646 §2, where the *restitutio in integrum* has as its presupposition the *res iudicata* stemming from two conforming judgments (c. 1641, 1°).

65. Cf. *Declaratio de foro competenti in causa nullitatis matrimonii, post sententiam negativam in prima instantia latam*, June 3, 1989, in *AAS* 81 (1989), pp. 988–990.

purposes of cc. 1641,1°, 1644 and 1684, even if Rota jurisprudence and doctrine are not unanimous in this regard.[66]

— When there are two or more tribunals competent for the same instance (concurrent forums of the first, second, or as an exception, third instance), only one of them can judge; the other tribunal (or tribunals) become absolutely non-competent. This absolute non-competence is *functional*, because it comes from the dynamism of the process; statically, before the process begins at the respective instance, those tribunals are absolutely competent. The identification of competence among those statically concurrent tribunals takes place, in the dynamic phase, according to the criteria of prevention (cc. 1415 and 1416).

— Competence is also absolute, in favor of the tribunal indicated by law in the following situation: incidental matters (cc. 1588 and 1652), the plaint of nullity (in which situation, lacking a valid judgment, the principle *ne bis in idem* does not apply: cc. 1621 and 1624), and *restitutio in integrum* (c. 1646), because the rescinding trial allows a new (rescissory) judgment of the same grade as that being challenged (c. 1648). When the plaint of nullity is requested together with the appeal (c. 1625), the higher tribunal that declares the judgment null must resend the cause to the tribunal that pronounced the judgment (cf. c. 1669), except in the case of the Roman Rota.[67]

The following are other situations related to the dynamic exercise of jurisdiction (and, in some way, of competence as well) that, although they can create nullity of the judgment, are not a manifestation of non-competence:

— Due to *recusal* (cc. 1449–1451) where "the persons in question are to be changed, but not the grade of trial" (c. 1450); therefore, unless all the judges of a tribunal are recused (in which case it would be necessary to request an extension or commission to another tribunal, unless there is another concurrent one), the competence still belongs to the tribunal against the judge whose recusal has been admitted. The judgment pronounced by a recused judge can be challenged through the plaint of *remediable* nullity (cc. 1451 § 2, 1619, 1622,5°), in a way similar to what

66. Cf. X. BASTIDA, "Congruencia entre el 'petitum' y la sentencia," in J. MANZANARES (Ed.), *Cuestiones básicas de derecho procesal canónico*, cit., pp. 63–91; J. LLOBELL, "Note sulla congruenza e la conformità delle sentenze...," cit.; P. MONETA, "La nuova trattazione della causa matrimoniale," in *Ius Ecclesiae* 3 (1991), pp. 479–497. See introduction to the title regarding matrimonial causes.

67. Cf. SRR, *Facoltà straordinarie di S.E. il Decano della Sacra Romana Rota*, July 26, 1981, no. 4, in *AAS*, 74 (1982), p. 516; NSRR (1994), a. 52.

occurred with the offense in the *CIC*/1917,[68] or *irremediable* nullity if that unlawful judgment has violated the right to defense (c. 1620,7°).[69]

— If a tribunal does not have a sufficient number of judges to judge a cause (c. 1425 § 1), it does not for that reason become non-competent: it may ask the bishops' conference for the permission foreseen in c. 1425 § 4, to have a sole judge hear the cause; if he judges without this authorization, there is neither absolute nor relative non-competence, although the judgment will be remediably null (c. 1622,1°).

— The use of the oral or documentary contentious process, outside of the situations established by law (cc. 1656 § 2, 1686–1688, 1690, 1710, 1728 § 1),[70] involves the nullity of the judgment, at least that judgment indicated in c. 1622,5° (cf. c. 1669), but it does not originate the non-competence of the tribunal.

— The judgment will be irremediably null if the prohibition of c. 1447 is not complied with, although it is not a matter of (absolute) non-competence, but of protecting the independence of the judge.

VI. MODIFICATION OF THE TITULI OF COMPETENCES

1. *Commission, prolongation, and delegation of competence.*

a) We have insisted that the *CIC* prohibits the dispensation of procedural law (c. 87 § 1) and, as a result, the "relaxation" (modification) of the titles of competence established by the same *CIC*. Nevertheless, the Roman Pontiff not only is not subject to that prohibition—because he freely exercises his supreme power (c. 331)—but equity (cc. 221 § 2 and 1752) implies that, on certain occasions, it is appropriate or necessary to change the criteria of competency. This change devolves only upon the Roman Pontiff or upon whomever he entrusts this faculty: the only dicastery of the Roman Curia that—in most cases—can grant competence to a

68. Cf. cc. 1854–1857; sentence *coram* HUOT, February 2, 1984, nos. 7, 18–21, in *Il Diritto Ecclesiastico* 95/2 (1984), pp. 241–254; A. QUINTELA, *El atentado en el proceso canónico* (Pamplona 1972), pp. 91–93 and 188–191; F. ROBERTI, *De processibus*, cit., no. 153, pp. 449–450.

69. Cf. G. ERLEBACH, *La nullità della sentenza giudiziale 'ob ius defensionis denegatum' nella giurisprudenza rotale* (Vatican City 1991), pp. 59, 215 and 217.

70. Cf. *Comm.* 16 (1984), pp. 76–77; Signatura, Decr., July 7, 1989, in "Decreti sulla commissione, la proroga e altre questioni...," cit., no. 10, pp. 732–734; P.A. BONNET, *Il giudizio di nullità matrimoniale nei casi speciali* (Rome 1979), pp. 105–107, 156; C. DE DIEGO-LORA, "Naturaleza y supuesto documental del proceso 'in casibus specialibus,'" in *Estudios de Derecho Procesal Canónico*, III (Pamplona 1990), pp. 63–65, 198, 209–211.

non-competent tribunal is the Apostolic Signature.[71] An exception to this principle is the *commission* (the concept of which we will indicate below) that, in favor of an outlying tribunal, can be performed by: the CDF to judge, normally only at the first instance, some offenses that are reserved for that dicastery; or the CDWDS to judge the nullity of the sacred ordination (c. 1709 § 1 and *PB* 68). The Nuncio of Spain can commission to the Spanish Rota some causes for which, without this commission, that tribunal is absolutely non-competent.[72]

b) The proper institutions for granting competence to a non-competent tribunal are the *commission* and the *extension* of competence. The commission makes competent a tribunal the non-competence of which is absolute; the extension grants competence to the relatively non-competent tribunal. In both cases, it is a matter of modifying the competence of whoever already possesses it, broadening it so that a tribunal that was non-competent can lawfully judge the dispute (or the type of dispute). In this sense, with the commission or the extension, jurisdiction is not conferred, inasmuch as it was already possessed by these tribunals, although they were non-competent.

c) Through delegation, jurisdiction is also transferred to someone who does not possess it.In order to avoid conceptual and terminological confusion, it is necessary to distinguish two types of delegation: that by which jurisdiction is granted to someone who does not possess it in any way, because the he is not a judge without this delegation, which confers in the same act the respective competence; and the delegation made in favor of a judge (or tribunal) in order that he be able to judge a cause for which, without the delegation, he is non-competent, although he already possesses jurisdiction. This second type of delegation can contain the commission as well as the extension of competence.

The diocesan bishops, who are not subject to the prohibition of c. 135 § 3, can grant the first type of delegation (cc. 1419 § 1 and 1420 § 2). Nevertheless, with respect to the latter case (in favor of a judge or tribunal that existed prior to the delegation), they can only confer the commission to judge a cause (or types of causes) regarding which the tribunal is absolutely non-competent because, previously, the bishop (or the bishops who erect an inter-diocesan tribunal) had made a reserve, which is normally material (cc. 1420 § 2 and 1423 § 2). The extension by a bishop to a

71. Cf. c. 1445 §3,2°; *PB*, a. 124,2° and 3°; Signatura, "Decreti sulla commissione, la proroga e altre questioni...," cit., decree no. 8, p. 731; idem, Decr., undated, in F. DANEELS, "Brevis introductio ad declarationem...," cit., p. 411.

72. Cf. JOHN PAUL II, M.P. *Nuntiaturae Apostolicae...*, cit., art. 37 § 2. Cf. also M.P. *Apostolico Hispaniarum Nuntio*, cit., a. 38,2° and 3°; SECR. ST., *Ordo pro causis iudicialibus expediendis in Tribunali Rotae Nunciaturae Apostolicae in Hispania*, 1952, a. 23, in X. OCHOA, *Leges Ecclesiae*, III, no. 2328n.

vicarious tribunal does not in fact seem possible, because the competence of both either coincides (in which case the bishop cannot extend the competence he lacks), or if it differs it is because the bishop has made a reserve, which makes his tribunal absolutely non-competent (and, therefore, the applicable institution is the commission of competence, not the extension). If the tribunal has received jurisdiction through delegation, it is also absolutely non-competent for causes not contemplated in the delegation, except for connected causes[73]; therefore, the extension is not possible. On the other hand, these options for the bishops can only be exercised within the (normally territorial) scope of their jurisdiction (c. 1469; c. 201 § 2 *CIC*/1917), because the granting of competence by one diocesan tribunal (*a quo*) to another (*ad quem*) is prohibited, even with the consent of the respective bishops.[74] The justification for this prohibition is simple: if the tribunal *ad quem* were considered to be a delegate of the bishop *a quo*, the bishop would exercise jurisdiction *extra territorium*, which is prohibited by c. 1469. In addition, the bishop of the diocese *ad quem* cannot grant to this tribunal the competence he himself lacks (which belongs to the bishop of the diocese *a quo*), even if it is relative non-competence.

2. *Judicial forwarding of the commission and of the prolongation before the Apostolic Signature*

a) The bishops may only perform delegation and commission *within* their dioceses (barring the exceptional circumstances of c. 1469 § 1, or to gather evidence: c. 1469 § 2) and regarding matters not reserved by the Roman Pontiff. Any other modification of competence only devolves upon the pope and the Roman dicastery to which he has entrusted, with some limits, said power, which in most cases is the Apostolic Signature. The provisions regulating the modification of competence by the Signature are: c. 1445 § 3,2°, art. 124,2° and 3° of *Pastor bonus*, art. 18,2° and 3° of the *SNAS* and some rescripts by the Secretary of State (whose faculties *ad tempus* have been extended).[75] From all these provisions —which do not always precisely use the terms *jurisdiction*, *competence*, *extension* and

73. Cf. c. 1414. The doctrine differs as to the scope of the delegation that allows the connection: for it is only possible in the "universal" delegation (cf. F. ROBERTI, *De processibus*, cit., no. 79, pp. 218–219); for others it is possible also in the delegation *ad casum* (cf. M. LEGA–V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, cit., p. 78).

74. Cf. the decree of the Signatura, June 22, 1989, cit.

75. Cf. SECR. ST., *Rescritto al Prefetto della Segnatura Apostolica sulla commissione e la proroga della competenza*, March 26, 1974, in X. OCHOA, *Leges Ecclesiae*, V, no. 4279; *Rescritto al Prefetto della Segnatura Apostolica su alcune facoltà riguardanti: il trasferimento delle cause ad un tribunale diverso da quello competente, la dispensa dalle leggi di procedura e la sanazione di atti giudiziari nulli*, May 21, 1975, no. 1, ibid., no. 4384.

commission[76]—it can be concluded that the Apostolic Signature, by virtue of its administrative power equivalent to that of a "Congregation for justice," possesses vicarious power to grant: the commission to the Roman Rota to judge a cause at the first instance (c. 1444 § 2); the extension to an outlying tribunal of the first instance; the commission to an outlying tribunal of the first instance to judge at the second or third instance; and the commission to an outlying tribunal of the second instance to judge at the second instance or third instance a cause from a tribunal of which it is not an appeals tribunal, according to the provisions of cc. 1438 and 1439.

b) In all cases, the following are necessary and cumulative conditions: the request of one party and the consent of the other, although, pursuant to *Pastor bonus* 124,2° and 3°, it could be sufficient to "hear" the other party, similarly to the prescription of c. 1673,3° and 4°; just cause (the impossibility of constituting a tribunal at the competent see due to a lack of suitable persons, to facilitate the instruction, to avoid translations, etc.); and the commission must be *ad casum (per cause singole)*. The Signature can grant stable extensions of competence, which are usually *ad tempus*, at the request of the bishop *a quo* with the consent of the bishop of the tribunal *ad quem* (c. 1445 § 3,2°; *PB* 124,3°). However, the approval of the Roman Pontiff is necessary for commissions at the stable second or third instance, or at the fourth or subsequent instance *ad casum* (cf. the rescript of 1974, cited).

c) At present, there are stable local tribunals of the third instance in Spain (the Rota of the Nunciature) and Hungary (the tribunal of the Primate). The tribunals of Poland, Lithuania, and Cologne (Germany) were eliminated, because the Holy See is tending to eliminate these exceptions to make the Roman Rota the only stable tribunal of the third instance, and any party will be able to appeal (at the second instance) to that tribunal without the need for consent from the other party.[77]

d) The Signature can also amend the *perpetuatio iurdictionis* (c. 1512,2°), transferring the cause to another tribunal, when grave violations of procedural law are proven, and the situation cannot be remedied by substituting the judges (cf. cc. 1450 and 1624). In order to determine the new tribunal (it would always be a commission) it is necessary to hear the opinion of the parties (rescript of 1975). The Deacon of the Roman Rota, by virtue of some special faculties granted by the Roman Pontiff, can also modify the *perpetuatio iurisdictionis* transferring the cause to the Rota when, upon hearing the cause incidentally, there arise irregularities so

76. Cf. J. LLOBELL, "Centralizzazione normativa processuale...," cit., pp. 465–475.

77. Cf. Z. GROCHOLEWSKI, "De ordinatione ac munere tribunalium in Ecclesia ratione quoque habita iustitiae administrativae," in *Ephemerides Iuris Canonici* 48 (1992), p. 55; J.-C. PÉRISSET, "Questions canoniques concernant les Pays sortis de la domination communiste dans l'Est Européen," in *Revue de Droit Canonique* 43 (1993), p. 209.

grave that they make one presume the (procedural or substantive) unlawfulness of the definitive judgment of the lower tribunal.[78]

3. *Unlawful prolongation*

a) Although it is evident that the Holy See wishes to reserve the modification of titles of competence, the canonical code recognizes the extension in fact when a relatively non-competent tribunal does not reject the petition, and the respondent does not lodge a declinatory exception of non-competence (before the judge who has summoned the respondent) before the decree of *litis contestatio* (cc. 1505 § 2,1°, 1459–1461).[79]

b) The Code's desire to prohibit any modification of titles of competence without the express intervention of the competent dicastery of the Roman Curia was manifested at the genesis of the *CIC*/1917 and in various legislative and administrative interventions of the Holy See, which stressed the nature *ad validitatem* of some requirements of titles of competence for matrimonial causes (see introduction to the title on matrimonial causes and the commentary on c. 1673). Therefore, departing from the general opinion of doctrine[80] and jurisprudence, we believe that the will of the legislator of the *CIC*s of 1917 and 1983 is that the non-competent tribunal (with absolute and relative non-competence) continues to be non-competent after the decree of *litis contestatio*, a decree that only has effect with respect to the object of the dispute (cc. 1513–1516), not with respect to the competence of the non-competent tribunal (c. 1512,2°).

c) Because the (absolute and relative) non-competence of the tribunal is not remedied, the personal sanctions (on judges and legal representatives) provided in cc. 1457 § 1 and 1488 are possible, although the effects of the two types of non-competence of the judgment differ: if non-competence is absolute, the judgment is irremediably null (c. 1620,1°); if the non-competence is relative, the judgment is, in principle, unchallengeable due to that autonomous violation of the law. We say "in principle" because c. 1460 § 2 has introduced the possibility of the plaint of nullity and of *restitutio in integrum* against a judicial decision rejecting the exception of relative non-competence. This reflects a certain inconsistency in the system. On the one hand, the *CIC* has not included the titles of matrimonial competence—which, in canonical practice, originate the vast majority of causes (see introduction to the title on matrimonial causes and

78. Cf. note 67.
79. Cf. sentence *coram* SABATTANI, March 13, 1958, in *SRR Dec* 50 (1958), pp. 143–155; sentence *coram* HUOT, February 2, 1984, cit., nos. 6, 18 and 20.
80. Cf. one of the few exceptions to that "communis opinio" in A. BERNÁRDEZ CANTÓN, "Tratamiento jurídico de la competencia territorial o relativa en las causas matrimoniales," in *Dimensiones jurídicas del factor religioso. Estudios en homenaje al Prof. López-Alarcón* (Murcia 1987), pp. 65–79.

the commentary on c. 1673)—among those of absolute competence, as nonetheless do the civil systems, at least in causes in which the public good is directly involved (e.g., in matrimonial causes).[81] On the other hand, the *CIC* offers some challenges with a difficult theoretical application and interpretation, which weaken the stability and security of juridical relations subject to a relatively non-competent judge.[82] Nevertheless, achieving this stability and security was the motive that justified the autonomous non-nullity of the judgment by said judge; as a result the norm can be considered inconsistent. In fact, declaring nullity of the judgment of a non-competent judge (at least in causes of nullity of marriage) provides greater security for the value of the judgment than affirming the principle of the validity (in that it is relative non-competence) and, at the same time, introducing challenges that violate this principle.[83] In any event, the new challenges established in c. 1460 § 2 guarantee, for the party who lodged the exception, the protection of the right to be judged by the competent tribunal, which creates an important legislative improvement in the current *CIC* over the *CIC*/1917.

d) The most recent canonical doctrine justifies the traditional interpretation of the normative system, arguing that it is a matter of a concession in which the legislator "runs a calculated risk," because he does not find it necessary to respect titles of competence in order to guarantee that the trial will be *secundum veritatem*[84]; or because c. 10 does not consider the relatively non-competent judge to be disqualified.[85]

With regard to the first objection, experience (manifested in provisions to protect the respect of titles of competence in causes of nullity of marriage) shows the direct relationship between the violation of titles of competence and the motives justifying the declaration *secundum veritatem* of the nullity of the matrimonial bond.[86]

With respect to the non-disqualifying nature of relative non-competence, it is necessary to remark that c. 10 distinguishes between nullity of the act (of the judgment in our case) and disqualification of the subject (of the judge). It is true that, according to c. 124 § 1, the disqualification of the tribunal could not be affirmed, because law does not establish the typical

81. Cf. A. DE LA OLIVA–M.A. FERNÁNDEZ, *Lecciones de derecho procesal*, I, 2nd ed. (Barcelona 1984), pp. 233–236.

82. Cf. J. LLOBELL, "Il giudicato nelle cause sullo stato delle persone," in *Ius Ecclesiae* 5 (1993), pp. 283–313; idem, "Perfettibilità e sicurezza della norma canonica," in CPITL, *"Ius in vita et in missione Ecclesiae." Acta Symposii Internationalis Iuris Canonici, in Civitate Vaticana celebrati diebus 19–24 aprilis 1993* (Vatican City 1994), pp. 1231–1258, §8; S. VILLEGGIANTE, "Le questioni incidentali," in P.A. BONNET–C. GULLO (Eds.), *Il processo matrimoniale canonico*, cit., pp. 665–672.

83. Cf. J. LLOBELL, "Centralizzazione normativa processuale...," cit., pp. 465–477.

84. Cf. P.A. BONNET, "Les jugements en général," cit., §2.1.2.

85. Cf. M.J. ARROBA, *Diritto processuale canonico*, cit., pp. 84–85 and 109–110.

86. Cf. c. 1488 §2 and the sentence *coram* HUOT, February 2, 1984, cit.

sanction of the act performed by the disqualified person: in our case, nullity of the judgment pronounced by the relatively non-competent judge. This approach involves considering that the absolute non-competence derives from principles of public law (which is observed in the procedural order determined to protect the public good), while relative non-competence would come from mere principles of private law (for the benefit of the convenience of the parties) and, therefore, the respective titles would be waivable by the parties.[87] However, c. 1407 § 1 uses a disqualifying formula: "nemo in prima instantia conveniri potest, *nisi* coram iudice ecclesiastico qui competens sit ob unum ex titulis qui in cann. 1408–1414 determinantur" (cf. c. 39 on administrative acts). When it is a matter of ecclesiastical law, the legislator has wanted to correct the immediate consequence of disqualification (nullity of the judgment), retaining the personal effects of the violation of c. 1407 § 1. For this reason, the sanctions of c. 1457 § 1 are possible, even if the judgment is valid, giving rise to weakened disqualification. Doctrinal justification of the current legal system (with strict logical coherence, demonstrating the substantive incoherence of the system) leads to a contradictory statement: it is said that the relatively non-competent judge is nonetheless absolutely competent.[88]

In favor of our thesis, we can invoke another line of reasoning that is directly related to the ecclesiological basis of the power of the diocesan bishop. Membership in the College of Bishops (due to the mere receipt of the fullness of the sacrament of the order) involves a certain power of each bishop over the entire Church.[89] However, in each diocese—apart from the power of the Roman Pontiff (cc. 331, 333, etc.)—the proper and immediate ordinary power belongs only to the diocesan bishop.[90] The power of the other bishops—and, even more so, of their tribunals—is limited by this ecclesiological fact, which provides the canonical concept of (relative) non-competence a nature and a force different from those that that same institution possesses in civil systems. The tribunals of each State receive jurisdiction and limits on their exercise (competence) from the same source of power ("the sovereign people," in democracies[91]). Canonical tribunals receive jurisdiction from the holder of the proper power (the diocesan bishop), with the limits of competence established by the Roman Pontiff in laws, without which the power of each bishop—and of his tribunal—would be ecclesiologically interchangeable with that of the pastor of another diocese.

87. Cf., above all, F.X. WERNZ-P. VIDAL, *Ius Canonicum*, VI, *De processibus* (Rome 1949), no. 47, pp. 53–55.
88. Cf. J.L. ACEBAL LUJÁN, commentary on c. 1407, in *CIC Salamanca*; M.J. ARROBA, *Diritto processuale canonico*, cit., pp. 84–85, 115–116.
89. Cf. *CD* 2–6; cc. 336, 967 §1, etc.
90. Cf. *CD* 8; c. 381.
91. Cf. *Constitución Española*, December 6, 1978, a. 117,1°; *Costituzione della Repubblica Italiana*, December 27, 1947, a. 101.

4. *Moment of the process in which the competent tribunal is determined*

With regard to the moment of the process in which the competent tribunal is determined, some practical criteria should be presented:

a) The non-competent tribunal at the moment of receiving the petition must reject it (cc. 221 § 1, 1505 §§ 1 and 2,1°).

b) Canon 1512,2° indicates that the *perpetuatio iurisdictionis* belongs to the judge who possesses a legitimate title of competence at the moment at which "the summons (on the respondent) has been lawfully served or the parties have appeared before the judge to handle the cause."[92] Therefore, it is not enough to be competent at the moment when the petition is accepted and the decree of summons is pronounced; it is necessary to be so at the moment when the summons is served on the respondent.

c) Having possessed *perpetuatio iurisdictionis* in a cause for which the tribunal *was* competent, but the instance of which abated (c. 1520) or was the object of the waiver (cc. 1524–1525)—and consequently the definitive judgment had not been pronounced (c. 1517)—cannot be invoked as a title of competence. In this case, unless the action has been extinguished (c. 1492 § 1) or it has been waived (c. 1485), it is possible to initiate a new instance at the same grade as the one that did not conclude with the judgment, and on the same cause: if there is no judicial decision on the merits, the principle *ne bis in idem* does not apply. The new petition can only be presented before the same tribunal *if it is still* competent, because the former competence (that which allowed the expired process) does not constitute, in itself, an autonomous title of competence; what we call the "historical forum" does not exist according to a response of the CPI.[93]

d) If one of the parties comes to possess any of the conditions established in c. 1405 §§ 1 and 3, the tribunal that has already summoned the respondent loses the *perpetuatio iurisdictionis*, unless it is the one provided by that canon, and it must transfer the cause to the new subjectively-competent tribunal.[94] In order to determine the various possibilities according to the phase of the process and the effect of this absolute non-competence, some of the criteria taken from the "laws enacted in similar matters" may be useful (c. 19).[95]

92. Cf. c. 1507 §3. See the commentaries on those canons.

93. Cf. *Responsio 2ª ad propositum dubium in plenario coetu diei 29 aprilis 1986. Summus Pontifex Ioannes Paulus II die 17 maii 1986 eam publicari iussit*, in *AAS* 78 (1986), p. 1324; J. LLOBELL, "Acción, pretensión y fuero del actor en los procesos declarativos de la nulidad matrimonial," in *Ius Canonicum* 27 (1987), pp. 639–642.

94. Cf. J. OCHOA, "I titoli di competenza," cit., p. 143; F. ROBERTI, *De processibus*, cit., no. 149, p. 434.

95. Cf. the temporary provisions of M.P. *Sollicita cura*, cit.; J. LLOBELL, "Il tribunale di appello del Vicariato di Rome," cit., pp. 274–277.

1404 **Prima Sedes a nemine iudicatur.**

The First See is judged by no one.

SOURCES: c. 1556

CROSS REFERENCES: cc. 331, 333 § 3, 361, 1405 § 2, 1629,1°

COMMENTARY

Joaquín Llobell

1. Subjectively, the expression "First See" in c. 1404 refers only to the Roman Pontiff, as expressly indicated in c. 1058 of the *CCEO*. Given the "the nature of things or from the context" of the provision (c. 361), it is evident that any other member of the faithful is subject to some canonical jurisdiction, even if that member has the highest sacramental or jurisdictional position (c. 1405).

2. The acts of any ecclesiastical body—except acts of the Roman Pontiff or an ecumenical council, which also holds supreme power (cc. 336 and 337 § 1), presupposing the intervention of the pope (c. 341 § 1)—are subject to various controls:

a) *At the outlying level* (particular churches, etc.). Legislative power is controlled by the Roman Pontiff through the dicasteries of the Roman Curia by the *recognitio* (cc. 446 and 455 § 2) and the recourse established by *Pastor Bonus* 158. Judicial power is subject to various challenges to judgments before outlying tribunals or the Holy See. The lawfulness of acts of the administrative or executive power are directly guaranteed by the process of hierarchical recourse and, indirectly (once the administrative channels before the Roman Curia are exhausted), through judicial channels, by the administrative-contentious process (c. 149 § 2, 1400 § 2 and 1445 § 2).

b) *At the level of the Roman Curia.* The legislative power *stricto sensu* is not possible without the express intervention of the Roman Pontiff (cc. 29 and 30; *PB* 18). Therefore, there is no right to challenge a norm of the universal legislator. Acts of the administrative power not specifically confirmed by the Roman Pontiff (c. 1405 § 2) are susceptible to the administrative-contentious process (the acts of the third section of the Apostolic Signatura before the second section). All judicial decisions of the apostolic tribunals admit some challenge: the valid decisions of the first instance on the merits of the cause through the appeal to another panel of the same tribunal; other decisions, through the plaint of nullity, full

reinstatement, and *nova causae propositio*, depending on the competence of each apostolic tribunal and the norms of the respective challenge, coming from common law and the particular law of each apostolic tribunal.[1]

3. The provision of c. 1404 does not involve a lack of limits on the power of the Roman Pontiff, who is subject to the norms of divine law, including the lack of power to deprive the diocesan bishops' power of meaning.[2] Nevertheless, canon law does not recognize any jurisdiction over the person of the Roman Pontiff or his juridical acts.[3] Since the provision of c. 1404 can be directly traced to divine law, it cannot be disposed of by the Roman Pontiff. Therefore, it is impossible to claim that the principle "Prima Sedes a nemine iudicatur" can suffer any limitation from international agreements ratified by the Holy See, which are part of the canon law (c. 3). If any of these conventions should establish the subjection of the supreme authority of the signatory communities of that agreement to any jurisdictional organ, the Holy See cannot sign that treaty without excluding the subjection of the Roman Pontiff (cf. c. 365 § 1,2°) or, should he sign it, he should denounce it.

The situation would be different if it derived from the demands of international agreements signed by the Holy See that were contrary to the provisions of canon law not required by divine law. In this case, if there is no express reserve, the requirements of these agreements would be canonical norms that would derogate the internal legislation (c. 3). Examples of hypothetical procedural demands on canon law derived from international agreements could be the need for technical defense in any process or procedure, for the right to appeal, for the reasoning of a judgment, etc.

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1. Cf. c. 1444 §1,2° and §2; *SNAS*, arts. 77 and 82; Signatura, sentence *coram* Fagiolo, February 27, 1993, cit. in J. LLOBELL, "Note sull'impugnabilità delle decisioni della Segnatura Apostolica," in *Ius Ecclesiae* 5 (1993), pp. 684–687 and 697–698; G. MONTINI, "De querela nullitatis deque restitutione in integrum adversus sententias Sectionis Alterius Supremi Signaturae Apostolicae Tribunalis," in *Periodica* 82 (1993), pp. 669–697.

2. Cf. J. HERVADA, "Estructura y principios constitucionales del gobierno central," in *Ius Canonicum* 22 (1971), p. 51; E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), p. 167; J. LLOBELL, "Centralizzazione normativa processuale," in *Ius Ecclesiae* 3 (1991), pp. 432–435.

3. See commentaries to cc. 333 §3, 1405 §2 and 1629,1°.

1405 **§ 1. Ipsius Romani Pontificis dumtaxat ius est iudicandi in causis de quibus in can. 1401:**
1° eos qui supremum tenent civitatis magistratum;
2° Patres Cardinales;
3° Legatos Sedis Apostolicae, et in causis poenalibus Episcopos; (4) alias causas quas ipse ad suum advocaverit iudicium.

§ 2. Iudex de actu vel instrumento a Romano Pontifice in forma specifica confirmato videre non potest, nisi ipsius praecesserit mandatum.

§ 3. Rotae Romanae reservatur iudicare:
1° Episcopos in contentiosis, firmo praescripto can. 1419 § 2;
2° Abbatem primatem, vel Abbatem superiorem congregationis monasticae, et supremum Moderatorem institutorum religiosorum iuris pontificii;
3° dioeceses aliasve personas ecclesiasticas, sive physicas sive iuridicas, quae Superiorem infra Romanum Pontificem non habent.

§ 1. In the cases mentioned in Can. 1401, the Roman Pontiff alone has the right to judge:
1° Heads of State;
2° Cardinals;
3° Legates of the Apostolic See and, in penal cases, bishops;
4° other cases which he has reserved to himself.

§ 2. A judge cannot review an act or instrument which the Roman Pontiff has specifically confirmed, except by his prior mandate.

§ 3. It is reserved to the Roman Rota to judge:
1° Bishops in contentious cases, without prejudice to Can. 1419 § 2;
2° the Abbot primate or the Abbot superior of a monastic congregation, and the supreme Moderator of a religious institute of pontifical right;
3° dioceses and other ecclesiastical persons, physical or juridical, which have no Superior other than the Roman Pontiff.

SOURCES: § 1: c. 1557 §§ 1 et 3; *PrM* 2 §§ 1 et 3
§ 2: c. 1557 § 2

CROSS REFERENCES: cc. 29, 30, 333 § 3, 1417, 1444 § 2

COMMENTARY

Joaquín Llobell

1. *Cases reserved or advocated to the judgment of the Roman Pontiff* (§ 1)

The cases considered in c. 1405 are the *major causes*, which are of two types: *a iure*, when the specific situation is described by the norm, and *ab homine*, when it is the transfer of a cause not explicitly reserved by law (§ 1,4° and c. 1444 § 2). The reservation possesses a material limitation, since it must deal with causes belonging to the proper jurisdiction of the Church (cf. cc. 1401 and 1671). Therefore, to the extent that the Church has waived the privilege of the forum, processes involving a person indicated in c. 1405 on matters that are not exclusive to the canonical jurisdiction can fall under both civil and canon law, according to the competence of each system. These are called *mixed forum* causes.

The expression *causas spiritualibus adnexas* (c. 1401,1°) is very broad. Any disputes between persons subject to canon law could be considered such, *by reason of the parties to the cause* (cf. 1 Cor 4–6)—especially if the respondent possesses a certain ecclesiastical importance[1]—or when a non-baptized person, for reasons of conscience, wishes to sue a person subject to canon law (c. 1476). According to an objective criterion, for example, the following are included among *causas spiritualibus adnexas*: marriage (sacramental or not[2]), civil acts affirmed by an oath that puts God as a witness (cc. 1199 § 1 and 1200 § 1), crimes defined by canon law and civil law, contracts that are important in both systems (cf. c. 1290), etc.

In all mixed forum causes in which the respondent is a person indicated in c. 1405, any plaintiff (baptized or not: c. 1476) who wishes to submit the dispute to the jurisdiction of the Church must address the Roman Pontiff or the Roman Rota. A refusal to exercise this jurisdiction for reasons of expediency could involve an omission that would allow the imposition of sanctions (c. 1457 § 1).

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1. Cf. *coram* PALESTRO, decree, April 13, 1988 and sentence, June 15, 1988, in *Ius Ecclesiae* 1 (1989), pp. 581–614; J. LLOBELL, *Aspetti del diritto alla difesa, il risarcimento dei danni e altre questioni giurisdizionali in alcune recenti decisioni rotali*, ibid., pp. 587–611.

2. Cf. SIGNATURA, "Dichiarazione sulla giurisdizione della Chiesa cattolica riguardo al matrimonio celebrato tra due non cattolici, battezzati o no, e sul relativo processo giudiziario canonico," May 28, 1993, in *Ius Ecclesiae* 6 (1994), p. 366. See the commentary on cc. 1671 and 1672.

The commentators on the *CIC*/1917 were not in agreement concerning whether the subjective competence determined in c. 1557 (similar to the current c. 1405) applied to the benefit of either party or only the respondent.[3] Lega—one of the main drafters of the book *De processibus*—maintained the first position, invoking the "mind and the will of the legislator" (*CIC*/1917 c. 18; *CIC* c. 17). The current c. 1405 seems to agree with this approach, constituting a necessary forum, regardless of whether or not these persons are the plaintiff or the respondent. In favor of this interpretation (which involves an exception, not accepted by doctrine,[4] to the principle according to which the plaintiff follows the forum of the respondent), the *mens legislatoris* and the *ratio legis* can be invoked. If the law does not establish any privilege but seeks to protect the dignity of the public functions performed by those people and the independence of the judges,[5] these arguments apply if these persons are either plaintiffs or respondents.

On the other hand, the principle *actor forum rei sequitur* was applied to these causes in the law prior to the Code in the context of the "privilege of the forum," according to which an ecclesiastical person could be sued only before an ecclesiastical tribunal, regardless of the object of the dispute. However, if an ecclesiastical person were to act against a layperson in matters not pertaining to the exclusive jurisdiction of the Church, he was to turn to the civil tribunal.[6] As a result, the principle *actor forum rei sequitur* only is applied in first instance causes of relative competence in which there is not a forum concurrent with that of the respondent's domicile, not in causes of subjective or functional material absolute competence.

If any of the subjective juridical conditions established in c. 1405 is acquired with a cause pending before any other ecclesiastical tribunal in first or second instance, intervening absolute non-competence occurs and must be declared ex officio (cf. cc. 1459 § 1 and 1461). It is the only criterion of competence that may be modified *a iure*, which gives rise to an exceptional interruption of the *perpetuatio iurisdictionis*. All acts of the cause and the process (cc. 1472, 1522, 1451 § 2) performed up to that moment are valid and must be placed at the disposal of the Roman Pontiff or any tribunal to whom he delegates the cause, without the need for the notification established in c. 1417 § 2,[7] since it is not a transfer *ab homine*

3. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, I (Rome 1938), pp. 33–36; F. ROBERTI, *De processibus*, I, 2nd ed. (Rome 1941), no. 63, p. 187.

4. Cf. J.L. ACEBAL LUJÁN, commentary on c.1405, in *Salamanca Com.*

5. Cf. *Comm.* 10 (1978), p. 220; J. OCHOA, *I titoli di competenza*, in P.A. BONNET–GULLO (Eds.), *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), pp. 143–144.

6. Cf. E.F. REGATILLO, *Institutiones iuris canonici*, II, 4th ed. (Santander 1951), no. 342, p. 218.

7. Cf. SIGNATURA, litt. circ. *De effectibus, quoad exercitium iurisdictionis iudicis competentis, recursus ad Romanum Pontificem*, December 13, 1977, in *AAS* 70 (1978), p. 75.

but *a iure.* Canon 1518,2° allows the pronouncement of judgment by a tribunal found non-competent after litigation begins if it has given the decree of conclusion of the cause (c. 1599 § 3). If this decree has not been pronounced, the instance must be suspended and pursued before the pontifical tribunal (c. 1518,1°), because the outlying tribunal becomes absolutely non-competent. The reservation in favor of the Roman Pontiff does not require that he judge the cause personally; c. 331 indicates that the Roman Pontiff exercises the power "freely." Normally, the pope judges these causes through auditors of the Roman Rota, a commission of cardinals, etc., depending on the circumstances of the case.

The regulation of delegated judicial power was profoundly modified by the *CIC*/1917.[8] In the current discipline, a judgment from a delegate cannot be appealed to the delegator, since both constitute the same tribunal, such as the decision of the judge with vicarious power with respect to the proper ordinary (c. 1420 § 2). Canon 1880,2° of the *CIC*/1917 indicated: "There is no appeal of the judgment from the judge delegated by the Holy See to hear a cause, with the clause 'appeal excluded' ('appellatione remota')." In the law prior to the Code, delegations by the Roman Pontiff in favor of a judge who could easily act *contra legem* or unjustly, were frequent. Therefore, included with the clause "*appellatione remota*"—which could only be put there by the Roman Pontiff or the Ecumenical Council[9]—the challenge to the judgment of the delegate before the Roman Pontiff was allowed.[10] Canon 1880,2° was interpreted as a prohibition on appealing against the merits of the cause (the appeal *stricto sensu*), but allowing a challenge for other reasons.[11]

Currently, in the case of the delegate for the causes of c. 1405 § 1, the judgment is unappealable, unless there is a precautionary measure against the appellate tribunal in the assignment of the cause.[12] Nevertheless, causes judged by the Roman Rota in the first instance (because it is a delegate tribunal,[13] not when the Roman Pontiff directly designates *intuitu personae*, the members of the delegate tribunal, even if all of them are Rotal judges) are appealable before the Rota, "unless the rescript entrusting the task provides otherwise" (c. 1444 § 2).

In the law prior to the Code, the reservation of "Heads of State" (§ 1,1°) was the custom in force in the Roman Curia (at least in matrimonial causes) and did not involve the non-competence of the diocesan

8. Cf. F. ROBERTI, *De processibus*, cit., nos. 140–143, pp. 408–421.
9. Cf. F.X. WERNZ, *Ius Decretalium*, V/1, (Prati 1914), p. 538.
10. Cf. *X* II, 28, 53.
11. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, II (Rome 1950), pp. 980–981.
12. Cf. *Comm.* 11 (1979), p. 149. To the contrary, Z. GROCHOLEWSKI, "L'appello nelle cause di nullità matrimoniale," in *Forum* 2/4 (1993), p. 22.
13. Cf. *NSRR* (1982), a. 25 §2.

bishops.[14] Canon 1557 § 1,1° of the *CIC*/1917 included in this phenomenon the children and "and those upon whom devolves the immediate right of succession in the sovereignty." Canon 5 of the 1976 *Schema*[15] retained this wording which, in 1978, was modified to the current text.[16] Some commission members proposed deletion of this title of competence as "a medieval throwback,"[17] but it was deemed appropriate to retain it because, "even if it is an extremely rare case … it deserves to be judged by the Roman Pontiff, who enjoys sufficient independence."[18] Part of the most recent doctrine does not accept this justification, finding it "hardly worthy with respect to other tribunals, including the Roman Rota." Moreover, other public functions are equally able to exercise pressure over tribunals but are not included in this phenomenon.[19]

According to Ochoa, the reservation does not involve a privilege but a manifestation of deference of the canonical system to the public office with which the person is vested. The judicial independence argument—adduced by the code commission, following tradition[20]—is also important, because, even if this title does not protect all situations that might merit it, it highlights the need to vigorously protect the principles constituting the process in other cases, such as in the penal or administrative-contentious process.

Only heads of state are included, regardless of their title (king, president of the republic, etc.) or whether they are head of state at the moment the process begins, according to national or international norms defining that juridical status, and even if they cannot exercise their authority because they are impeded, in exile, etc. With respect to matters over which the Church possesses jurisdiction, it does not matter whether or not the head of state is baptized (c. 1476). If the status as head of state should cease after the summons, the competence does not suffer any modification (c. 1512,2°). Nevertheless, if this status is acquired while the cause is pending, non-competence will take effect, which involves the loss of the *perpetuatio iurisdictionis* of the outlying tribunal in favor of that indicated in c. 1405.

This title does not include the consort.[21] However, in causes with the consort in which the head of state is also a party, as in causes of nullity of marriage or separation (cc. 1674 and 1694), there will necessarily be the reserve in favor of the Roman Pontiff.

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14. Cf. F.X. WERNZ, *Ius Decretalium*, IV/2, 2nd ed. (Prati 1912), pp. 683–684.
15. Cf. Code Commission, *Schema canonum de modo procedendi pro tutela iurium seu de processibus* (Typis Polyglottis Vaticanis 1976).
16. Cf. *Comm.* 10 (1978), p. 220.
17. Cf. *Comm.* 10 (1978), p. 220.
18. Ibid.
19. Cf. J. OCHOA, *I titoli di competenza*, cit., pp. 142–144.
20. Cf. F.X. WERNZ, *Ius Decretalium*, IV/2, cit., p. 684.
21. In a different sense, cf. P.V. PINTO, *I processi nel codice di diritto canonico. Commento sistematico al Liber VII* (Vatican City 1993), no. 26, p. 67.

"Cardinals" (§ 1,2°), from the time their creation becomes public "in the presence of the College of Cardinals" (c. 351 § 2) meeting in consistory (c. 353) are covered under this reservation. Cardinals *in pectore* are not included (c. 351 § 3). iSince a Cardinal is appointed for life, the reservation of the competence continues even if he ceases in office at the age of 75 or 80.[22]

The causes foreseen in this reservation, as in all other reservations of c. 1405, are those that come from civil (*contentious*: patrimonial, status of persons, etc.) or penal acts (c. 1400 § 1), not from administrative acts performed by those persons because they hold administrative power (*contentious-administrative*: cc. 1400 § 2 and 1445 § 2). Nevertheless, if those holding administrative power act unlawfully in its exercise, they can be sued personally in a penal or contentious process before the competent tribunal to "repair the damage caused" (c. 128).

"Legates of the Apostolic See" (§ 1,3°) are reserved. In this canon, the *CIC* uses a different terminology than in cc. 362–367, which refers to "Legates of the Roman Pontiff." The terminology of this canon (which repeats that of the *CIC*/1917) is formally broader (c. 361), although it is materially the same. Legates can perform diverse (stable or *ad casum*) functions as representatives of the Holy See before ecclesial or international organs. This group includes nuncios, pro-nuncios, internuncios, apostolic delegates, observers, etc.

The reservation of c. 1405 applies to any cause in which the legate is a party during his mission ("*durante munere*").[23] It also applies to any cause in which the penal or contentious matter is acts performed by the legates in the exercise of their mission, even if at the moment the process begins they have lost their status as a legate. Therefore, the reserve has a different breadth depending on the stability of the representation.

"In penal cases, bishops" (§ 1,3°) are included in the reservation, which includes all bishops, regardless of the office they hold.[24] It is based on deference to the fullness of the sacrament of order possessed by bishops, including those with no other power of jurisdiction than that which comes from the fact that they belong to the College of Bishops.[25]

Persons who are not bishops but perform the office of proper ordinaries in a secular jurisdictional structure possess the power of "episcopal" jurisdiction[26]; they are not included in this category. Commentators on the *CIC*/1917 offered diverse solutions to this issue. Some denied the reservation to the Roman Pontiff with penal causes involving persons who

22. Cf. c. 354; *PB* 5 §2; RGCR 41 §§1 and 3.
23. Cf. F. ROBERTI, *De processibus*, cit., no. 63, p. 184.
24. Some include those who "are equivalent in law" (c. 381 §2): cf. M.J. ARROBA, *Diritto processuale canonico* (Rome 1993), pp. 90–91 and 94.
25. Cf. *Comm.* 10 (1978), pp. 220–221.
26. J. HERVADA, *Diritto costituzionale canonico* (Milan 1989), p. 246.

govern a diocese without being bishops and affirmed the reserve for the Rota for contentious causes concerning the same persons.[27] Others believed that the reservation of contentious causes involving bishops to the Rota referred only to causes *de statu personarum* (e.g., on the status of legitimate son), but not to strictly patrimonial causes.[28] The current norm distinguishes between bishops and prelates with proper ordinary power of secular jurisdiction who have not been consecrated as bishops. For bishops, penal causes are reserved to the pope (c. 1405 § 1,3°), and contentious causes are reserved to the Rota (§ 3,1°). Prelates who are equal to bishops with respect to the power of jurisdiction, but are not bishops, are among the natural persons indicated in c. 1405 § 3,3°, which constitutes an innovation of the *CIC*.[29] This clause is also expressly indicated in c. 1061 of the *CCEO*.

"Other cases which he has reserved to himself" (§ 1,4°) involves an *ab homine* reserve, made by the Roman Pontiff *Motu propio* or at the instance of a party (cc. 1417, 1444 § 2), which must be distinguished from the *a iure* reserve established in the preceding numbers of c. 1405. Any member of the faithful has the right to request this reservation but not the right to obtain it. On the other hand, the reservation accepted by the pope, according to c. 1417, may not always be included under c. 1405 § 1,4°, since an act of reservation can indicate that the cause will be judged by the Roman Rota vicariously, modifying its absolute non-competence through the procedure of the respective commission, not as a delegate tribunal of a cause that the Roman Pontiff first reserves for himself and then entrusts to the Rota. This latter case is provided for by c. 1405 § 1,4°, and it does not matter whether the initiative comes *Motu proprio* or at the instance of a party, or whether the reserve comes before the beginning of the process or occurs at any moment or grade of a process that is already in progress.[30] The reserve may be directly requested from the Apostolic Signature, within the limits of its power, or from the Roman Pontiff, who normally will ask for the opinion of the "third section" of the Signature through the first section of the Secretariat of State (*PB* 41 § 1).

2. *Acts confirmed "in forma specifica" by the Roman Pontiff (§ 2)*

Canon 1683 *CIC*/1917 and c. 121 of the 1976 *Schema* contained a similar provision that was included in the current organization in 1978, specifying that the confirmation must be "specifically" confirmed.[31] In this context, *approval* and *confirmation* are equivalents for practical

27. Cf. F. ROBERTI, *De processibus*, cit., no. 63, p. 184–185.
28. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, I, cit., pp. 36–37.
29. Cf. *CIC*/1917 c. 1557 §2,2°; *Schema* 1976, c. 5 §2,3°.
30. For a different viewpoint, cf. M.J. ARROBA, *Diritto processuale canonico…*, cit., pp. 91–93.
31. Cf. *Comm.* 10 (1978), p. 220; 11 (1979), p. 77.

purposes.[32] Although the expression "act or instrument" of the canon is generic and does not exclude judicial acts, the main use for this reservation is to avoid a contentious-administrative process before the Apostolic Signature (restored by the canonical code in 1967 with art. 106 of the *REU*[33]) against the act of a dicastery confirmed in this way by the Roman Pontiff. *Pastor Bonus* 18 excludes necessary approval from the Roman Pontiff of judgments of the Roman Rota and the Apostolic Signature, "pronounced within the limits of its own competence." Therefore, the indication of c. 43 § 1 of the new Norms of the Roman Rota,[34] which foresees the confirmation of judgments of the Apostolic Signature against the auditors (c. 1445 § 1,3°), seems to contradict *Pastor Bonus* 18. In any event, in that it is not specifically a confirmation, an appeal is possible against another panel of the Signature.[35]

Judicial competence over single administrative acts is only allowed against acts that come from the dicasteries of the Roman Curia (c. 1445 § 2 and *PB* 123 § 1). Pontifical confirmation that supports the prohibition of c. 1405 § 2 must be interpreted in a strict sense, because it limits judicial protection of rights (c. 18). The RGCR has specified, non-retroactively, the procedure for obtaining the "approval specifically" (art. 126) and has recalled the norm of c. 1405 § 2 (art. 134 § 4). The prohibition on judicially challenging these administrative acts is similar to that of judgments pronounced by virtue of c. 1405 § 1,4°.

3. *Cases reserved to the Roman Rota* (§ 3)

"Bishops in contentious cases" (§ 3,1°) are those "personal" contentious causes of all bishops (because they are the faithful, but not only on their "personal status"). Canon 5 § 2 of the 1976 *Schema* expressly mentioned titular bishops, amending c. 1557 § 2,1° of the *CIC*/1917, which referred only to diocesan bishops. In 1978, it was decided the mention of titular bishops was superfluous.[36] The causes of prelates that are not bishops are within the competence of the Rota, pursuant to the provisions of § 3,3°.[37]

32. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, I..., cit., p. 415.
33. Cf. R. BERTOLINO, *La tutela dei diritti nella Chiesa. Dal vecchio al nuovo codice di diritto canonico* (Turin 1983), pp. 53–80 and 150–156; P. MONETA, *La giustizia nella Chiesa* (Bologna 1993), pp. 200–215.
34. Cf. *NSRR* (1982), a. 54 §1; *Lex propria Sacrae Romanae Rotae et Signaturae Apostolicae*, June 29, 1908, c. 9 §1, in *AAS* 1 (1909), pp. 20–35; NSSR (1934), a. 11 §1; *NSRR* (1969), a. 33 §1.
35. Cf. cc. 1683 and 1604 §1 *CIC*/1917 and arts. 74–77 *SNAS*; M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, I, cit., pp. 414–417; II, cit., p. 968; J. LLOBELL, "Note sull'impugnabilità delle decisioni della Segnatura Apostolica," in *Ius Ecclesiae* 5 (1993), pp. 690–693 and 697.
36. Cf. *Comm.* 10 (1978), p. 221.
37. In a different sense, cf. M.J. ARROBA, *Diritto processuale canonico*, cit., p. 94.

Since 1908,[38] the Rota has been absolutely non-competent to judge administrative acts by bishops or any other executive body. The acts performed by the bishop—in that he is a representative of a juridical person—that are not personal (that is why they are not reserved for the Rota) or administrative (and that is why they are not included in the exclusive contentious-administrative competence of the Apostolic Signature), are acts of the juridical person, performed through their representative, without involving another modification of the competence indicated in c. 1419 § 2.

"The Abbot primate, the Abbot superior of a monastic congregation and the supreme moderator of a religious institute of pontifical right" (§ 3,2°) are reserved to the Roman Rota. The *supreme moderators*of these institutes should not be confused with the broader concept of *major superiors*, although c. 620 includes the former among the latter. The general moderators of all religious institutes of pontifical right are included, without distinguishing between clergy and laypersons or between men and women.[39] General moderators of secular institutes, societies of apostolic life, and diocesan religious institutes are excluded.[40]

c) "Dioceses and other ecclesiastical persons, physical or juridical, which have no Superior other than the Roman Pontiff" (§ 3,3°) are reserved to the Roman Rota. Other juridical forms of particular churches (c. 368) or personal jurisdictional structures subordinate to the Congregation for Bishops and the Congregation for the Evangelization of the Peoples are considered equal to dioceses (e.g., military ordinariates and personal prelatures: cf. *PB* 76, 80 and 89). Other juridical persons who do not have a superior under the Roman Pontiff include religious and secular institutes and societies of apostolic life of pontifical right, international public associations (cf. c. 312 § 1,1°; *PB* 134), international sanctuaries (cf. cc. 1231–1232; *PB* 97,1°), and those juridical persons that are exempt from any other canonical jurisdiction, because this is indicated in the act of erection or because they have received exemption as a privilege (e.g., some pontifical athenaeums[41]).

Among the physical persons exempt from any jurisdiction other than that of the Roman Pontiff are, in addition to those indicated in §§ 1 and 3,1° and 2° of c. 1405: any holders of head offices of secular jurisdictions (cc. 295 § 1 and 381 § 2) that have not been consecrated bishops; holders of certain offices of the Roman Curia[42]; and the general superiors of secular institutes and societies of apostolic life of pontifical right, etc.

38. Cf. *Lex propria Sacrae Romanae Rotae*..., cit., c. 16; J. LLOBELL, "Il 'petitum' e la 'causa petendi' nel contenzioso-amministrativo canonico," in *Ius Ecclesiae* 3 (1991), pp. 131–133. See the commentary on cc. 1400 §2 and 1445 §2.

39. Cf. X. OCHOA, "I processi canonici in generale," in *Apollinaris* 57 (1984), pp. 203–204.

40. Cf. M.J. ARROBA, *Diritto processuale canonico*, cit., p. 94.

41. Cf. F. ROBERTI, *De processibus*, cit., no. 63, p. 186.

42. Cf. PIUS XI, Ap. Const. *Ad incrementum decoris*, August 15, 1934, arts. 41, 71, 127, 144, in *AAS* 26 (1934), pp. 497–521.

1406 **§ 1. Violato praescripto can. 1404, acta et decisiones pro infectis habentur.**

§ 2. In causis, de quibus in can. 1405, aliorum iudicum incompetentia est absoluta.

§ 1. If the provision of Can. 1404 is violated, the acts and decisions are considered not to have taken place.

§ 2. In the cases mentioned in Can. 1405, the non-competence of other judges is absolute.

SOURCES: § 2: c. 1558

CROSS REFERENCES: cc. 124 § 1, 1620,1°

COMMENTARY

Joaquín Llobell

For the meaning and the practical consequences of the diverse sanctions on decisions violating the norms of jurisdiction and competence of this canon, see the introduction to this title. The *CIC*/1917 (c. 1558) contemplated absolute non-competence, instead of non-existence, for decisions concerning the person of the Roman Pontiff. The 1976 *Schema* (c. 6 § 1) used "trial," which was replaced by "acts" in 1978.[1] In this way, it was stressed that it is not a jurisdictional act, because no one possesses this power over the Roman Pontiff.

1. Cf. Comm. 10 (1978), p. 221.

1407 **§ 1. Nemo in prima instantia conveniri potest, nisi coram iudice ecclesiastico qui competens sit ob unum ex titulis qui in cann. 1408–1414 determinantur.**

§ 2. Incompetentia iudicis, cui nullus ex his titulis suffragatur, dicitur relativa.

§ 3. Actor sequitur forum partis conventae; quod si pars conventa multiplex forum habet, optio fori actori conceditur.

§ 1. No one can be brought to trial in first instance except before a judge who is competent based on one of the titles in Cann. 1408–1414.

§ 2. The non-competence of a judge who has none of these titles is relative.

§ 3. The plaintiff follows the forum of the respondent. If the respondent has more than one forum, the plaintiff may opt for any one of them.

SOURCES: § 1: c. 1559 § 1
§ 2: c. 1559 § 2
§ 3: c. 1559 § 3

CROSS REFERENCES: cc. 221 § 1, 1409 § 2, 1440, 1459 § 2, 1460, 1476, 1502, 1504,1°, 1505 §§ 1 et 2,1°

COMMENTARY

Joaquín Llobell

1. Paragraph 1 of c. 1407 updates the generic norm of c. 221 §§ 1 and 2, on the judicial protection of juridical situations in the Church. Although § 1 of c. 1407 seems to correspond to § 2 of c. 221 (referring to the respondent) and § 3 of c. 1407 to § 1 of c. 221 (regarding the plaintiff), they are two sides of the same coin, because jurisdictional protection presupposes a dispute, which requires the presence of opposing parties before a competent tribunal. To request judicial ministry in the Church, it is not necessary that either party be a member of the faithful or possess canonical juridical personality (as c. 221 seems to suggest, using the word "faithful"). It is sufficient for the juridical relationship in dispute to be subject to canonical jurisdiction, which can occur even when two non-baptized physical persons are involved (cc. 1476 and 1674).[1] The exercise of the

1. Cf. Signatura, "Dichiarazione sulla giurisdizione della Chiesa cattolica riguardo al matrimonio celebrato tra due non cattolici, battezzati o no, e sul relativo processo giudiziario canonico," May 28, 1993, in *Ius Ecclesiae* 6 (1994), p. 366.

plaintiff's right to jurisdictional protection (exercised through the "claim": cf. cc. 1491, 1501–505), recognized in c. 221 § 1, does not necessarily imply that the right claimed has been violated by the respondent, nor that it is exercised before the judge to whom the respondent is subject *ad normam iuris*. Therefore, before summoning the respondent, the judge must verify his competence to decide the dispute set forth in the plaintiff's petition, some minimum formal requirements of the petition, and that the respondent has been able to commit the injustice of which the plaintiff accuses him or her (the *fumus boni iuris* of the petition).[2] Only in the presence of these presuppositions can the competent judge call the respondent to trial (c. 221 § 2).

2. Paragraph 1 of c. 1407 only takes the first instance into account because, once the competent tribunal for hearing the cause is determined in the first instance, successive competent tribunals are indicated by the same law (cc. 1438–1440). To present a petition in the first instance, the plaintiff must specify the competent ecclesiastical forum (c. 221 § 1); the law indicates the competent tribunal for the development of the process in other instances. For the second instance of a cause judged by an outlying tribunal, there are only two competent fora: the outlying appellate forum and the Roman Rota (cc. 1442–1444 § 1,1°).

The same § 1, stating that the competence at the first instance must come from "one of the titles determined in cann. 1408–1414," suggests that there is more than one competent tribunal. This suggestion is explicitly formulated in § 3. Canon 1560 of the *CIC*/1917 established the *necessary forum* for dispossession, ecclesiastical benefits, and the administration of assets and inheritances or legacies; in the current *CIC*, these titles are concurrent with the forum of the respondent (§ 3).

Since Roman law (3, 13, 2), the general principle of assignment of competence is that the plaintiff follows the forum of the respondent, originating with the general forum indicated in c. 1407 § 3, which can be concurrent with any of the special fora described in cc. 1410–1414.[3] Canonical doctrine unanimously affirms that the provision *actor forum rei sequitur* meets the demands of natural law and equity (cf. c. 221 § 2). The respondent must bear the initiative of the plaintiff which, even if it is lawful, does not necessarily imply the right to a favorable judgment (constituting the "action," according to one sector of doctrine[4]). This manifestation of the plaintiff's right to defense (c. 221 § 1) should not place the respondent in a position in which his or her reciprocal right to defense (c. 221 § 2) is impossible or particularly burdensome. The principles of judicial economy, *favor veritatis* (to facilitate the tribunal in objectively hearing the dispute and having the judgment correspond to the truth of the concrete juridical

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2. Cf. cc. 221 §1, 1502, 1504, 1505 §§1 and 2.
3. See the introduction to the title and the commentary on 1405,1°.
4. Cf. C. de Diego-Lora, *Poder jurisdiccional y función de justicia en la Iglesia* (Pamplona 1976), pp. 142–184, in particular, pp. 177–178.

relationship and to just means of configuring it[5]) and the respondent's right to defense justify that *actor forum rei sequitur* governs. On the other hand, most canonical causes refer to goods directly related to the *salus animarum*, over which the parties do not have freedom of disposition. They are peculiarities of the canonical process that, without weakening its juridical nature,[6] accentuate the importance of respect for titles of competence in the Church.

3. If the plaintiff presents his petition in the first instance before a tribunal that does not possess any of the titles of competence indicated in cc. 1408–1414, this tribunal is non-competent. Canon 1407 § 2 states that it is *relative* non-competence, although this statement is imprecise. In fact, the non-competence of that tribunal can also be absolute, due to: the grade of the instance, if it is only an appellate tribunal (e.g., inter-diocesan tribunals erected only for the second instance, according to c. 1439)[7]; the subject matter (e.g., a contentious-administrative process before a tribunal other than the Apostolic Signature or a penal cause before a tribunal of first instance erected only to judge causes of nullity of marriage[8]); and the status of one of the parties (those indicated in c. 1405).[9] The non-competence is relative when it is a matter of a tribunal of first instance that is non-competent for that particular cause.

The effects of the petition presented before relatively non-competent tribunals are that:

a) The judge must disqualify himself without summoning the respondent (c. 1505 §§ 1 and 2,1°). If the judge does not disqualify himself and summons the respondent, he can still declare his non-competence ex officio, when he perceives his non-competence before pronouncing the decree of joinder of issue (cc. 1459 § 2 and 1513 § 1). It is possible to appeal against a disqualifying decree (c. 1460 § 3). If the disqualifying decree is

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5. This principle, together with that of economy, justifies the titles of cc. 1410–1413, which specify the "forum of the proof": cf. *Comm.* 10 (1978), p. 224.

6. Cf. S. GHERRO, "Peculiarità del diritto canonico e scienza del diritto," in *Ius Ecclesiae* 5 (1993), pp. 531–544; J. LLOBELL, "I principi del processo canonico: aporia, mimetismo civilistico o esigenza ecclesiale?," in *Chiesa e Stato nei sistemi giuridici contemporanei. Atti dell'VIII Congresso Internazionale di Diritto Canonico. Lublin, Septermber 14–19, 1993*, at press; idem, "L'efficace tutela dei diritti presupposto della giuridicità dell'ordinamento canonico (c. 221)," in S. GHERRO (Ed.), *Studi sul secondo libro del 'Codex Iuris Canonici,'* Padova, at press.

7. Such non-competence is not brought about if the tribunal of appeal is also of first instance, e.g. those indicated in c. 1438,1° and 2° or the regional tribunals of appeal for the cases of nullity of marriage in Italy: cf. PIUS XI, MP *Qua cura*, December 8, 1938, in *AAS* 30 (1938), pp. 410–413; JOHN PAUL II, MP *Sollicita cura*, December 26, 1987, in *AAS* 80 (1988), 121–124.

8. Cf. c. 1423 §2. Such is the case with the Italian regional tribunals (of first and of second instance) just cited: cf. J. LLOBELL, "Centralizzazione normativa processuale e modifica dei titoli di competenza nelle cause di nullità matrimoniale," in *Ius Ecclesiae* 3 (1991), pp. 459–465.

9. See the introduction to the title.

pronounced ex officio by the president of the tribunal before summoning the respondent, the plaintiff can appeal before the college or the higher tribunal (c. 1505 § 4). If the decree is pronounced ex officio after the summons or is the consequence of the exception of non-competence lodged by the respondent, the one who has suffered a prejudice for this decision can appeal only before the outlying tribunal or the Roman Rota, according to the norm of c. 1460 § 3 which derogates the appeal to the college provided in c. 1505 § 4. The appeal usually is lodged by the plaintiff, but it can also be lodged by the respondent who has not filed the exception, or by another respondent who did not join in the exception brought by his or her joint litigant (e.g., the respondent spouse against the exception filed by the defender of the bond in a process for nullity of marriage). "Judges can be punished by the competent authority with appropriate penalties, not excluding the loss of office, if, though certainly and manifestly competent, they refuse to give judgement; if, with no legal support, they declare themselves competent and hear and determine cases" (c. 1457 § 1).

b) The summons of the respondent issued by a non-competent tribunal does not create *perpetuatio iurisdictionis* (c. 1512,2°), because this involves the competence of the tribunal at the time of the summons.

c) A respondent summoned by a non-competent tribunal can file the exception of non-competence ("declinatory of the forum") before the same tribunal (c. 1460 § 1), before it pronounces the decree of joinder of issue (c. 1459 § 2). If the exception is denied, the respondent cannot appeal (c. 1460 § 2).

However, c. 1460 § 2 allows the lodging of the plaint of nullity and the *restitutio in integrum* by anyone with standing to request these challenges to the judicial decision, not only for someone who is prohibited from appealing. The plaint of remediable or irremediable nullity can be lodged by any public or private party (c. 1626 § 1) and, ex officio, by the appellate tribunal hearing the matter in question, within the limits indicated by c. 1626 § 2 for the plaint of remediable nullity. Therefore, c. 1459 § 1 is still applicable, even if relative non-competence is not the direct cause of irremediable nullity and can only be redirected to the remediable nullity resulting from c. 1622,5°. Moreover, the sanction on a relatively or absolutely non-competent judge, established in c. 1457 § 1, does not refer only to a judge who does not disqualify himself before the joinder of issue, but, for the purposes of this provision, the initial non-competence persists when the judgment is pronounced. In fact, although the law only directly specifies the "sanction of the judgment" of the absolutely non-competent judge (the nullity established in c. 1620,1°), the "personal sanction" on the non-competent judge or tribunal is applicable regardless of the nature of the non-competence.[10] In this way, it seems increasingly clear that the

10. Cf. J.L. ACEBAL LUJÁN, commentary on c. 1407, in *Salamanca Com*; M.J. ARROBA, *Diritto processuale canonico* (Rome 1993), p. 85.

Romanist and pre-code approach to the process of a private nature, still present in the Codes of 1917 and 1983, has been abandoned. According to this approach, the titles of relative competence can be extended by the parties that submit to a non-competent judge, when he has not disqualified himself before the joinder of issue, because these titles would be considered of a private procedural nature, while the procedural public good would be protected by the titles of absolute non-competence.[11]

European civil systems have modified the system, gradually abandoning the concept of relative non-competence for public causes—such as causes of matrimonial nullity, separation or divorce[12], because "the extendability of the territorial competence involves a certain archaism in the concept of what the process must be ... The tendency to make territorial competence non-repealable is more pronounced in the more recent laws ... The non-repealable determination of the territorially competent judge is usually accompanied by a prohibition on express or tacit submission (even if, in reality, it is not necessary)."[13] In the process of drafting the *CIC*, a bishops' conference indicated, with regard to c. 1407: "It is necessary to acknowledge the competence of all tribunals to judge any causes submitted to them, without considering the title of competence." The code commission rejected the proposal because they deemed it "dangerous to the proper order of the administration of justice."[14]

4. The plaintiff's right to choose in § 3 of c. 1407 does not involve the repeal of the principle *actor forum rei sequitur*, considered substantially and not only formally. The principle seeks to facilitate the respondent's right to defense, judicial economy, and the hearing of the cause *secundum veritatem* by the judge. These objectives are sufficiently guaranteed by law, demanding that the plaintiff address any of the tribunals established in cc. 1408–1414. They can all be considered, *lato sensu*, "fora of the respondent," because with all of them the respondent possesses a juridical relationship: the domicile or quasi-domicile (the *general forum*, the forum of the respondent in the strict personal sense) or the juridical acts performed by him in that territory. The principle also applies when, in the same process, the respondent sues the plaintiff through the counteraction (cc. 1463, 1494 and 1495). In fact, even if the tribunal in question is territorially non-competent to judge the cause the respondent wishes to initiate

11. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, I (Rome 1938), pp. 39–41. This plan remains present in part of the more modern doctrine: cf. P.V. PINTO, *I processi nel codice di diritto canonico. Commento sistematico al Liber VII* (Vatican City 1993), no. 23, p. 64.

12. For Spain, cf. Ley July 20, 1981, disposición adicional 3ª.

13. A. DE LA OLIVA-M.A. FERNÁNDEZ, *Lecciones de derecho procesal*, I, 2nd ed. (Barcelona 1984), pp. 235–236.

14. *Comm.* 10 (1978), pp. 221–222. See, moreover, the motives indicated in the introduction to the title.

against the plaintiff, the objectives of the principle *actor forum rei sequitur* are achieved with the legal title of territorial competence, which governs the counteraction. Therefore, the reference of c. 1407 § 1 to the various titles of territorial competence (cc. 1408–1414) does not constitute a *numerus clausus*, because it must be integrated with the counteraction title.

1408 **Quilibet conveniri potest coram tribunali domicilii vel quasi-domicilii.**

Anyone can be brought to trial before the tribunal of domicile or quasi-domicile.

SOURCES: c. 1561 § 1

CROSS REFERENCES: cc. 12 § 3, 100–107, 1409, 1413,2°, 1504,4°, 1673,2°, 1699 § 1

COMMENTARY

Joaquín Llobell

1. Canon 1408 establishes the general forum, the domicile or the quasi-domicile of the respondent. The expression used to indicate the juridical subject who can be sued (*quilibet,* anyone) is identical to that of c. 1476, referring to the plaintiff. This terminological symmetry requires a specification of *who* that *quilibet* is and *what* this subject can do. The definition will be brief, because the detailed study of the concepts in question belongs to the commentaries on cc. 1400, 1445 § 2, 1476–1485, 1491, 1674, 1721, etc.

Any subject holding a juridical asset involving the canonical system has the right, *ad normam iuris,* to protection of that asset. For the protection to be juridically sufficient, it must include the possibility that conflicts over the asset may be decided by an independent body with the capacity of respect for its decision to impose on the parties. This is the reason for the importance of the contentious-administrative process in ensuring justice in juridical relationships in which a public authority intervenes and of the breadth of the subjects who, according to c. 1476, may request the judicial protection: *quilibet.* If the subject is a physical person, it does not matter if he or she is baptized (c. 1476).[1] If it is not a physical person, the *quilibet* demands protection for any subject capable of possessing juridical patrimony. What must be considered is whether there is a juridical asset that can be attributed to a subject, who will be its holder even if his or her juridical subjectivity does not result from any prior act of

1. Cf. PCIDSVC, *Responsum de iure accusandi matrimonium ab acatholicis,* January 8, 1973, in *AAS* 62 (1973), p. 59.

the authority.[2] With respect to the respondent, the reasoning is symmetric. The *quilibet* (c. 1408) includes any subject with the capacity to possess a domicile or quasi-domicile, or to "be found" in some place (c. 1409 § 1) and to enter a juridical relationship with the plaintiff. Public or private juridical persons have the headquarters established in their bylaws (cc. 118, 1480).[3]

Every subject capable of holding juridical patrimony can enter a conflict with another subject as a party to the process. This capacity to be a party corresponds to the juridical capacity regulated in book I of the *CIC* (cc. 96 et seq.). However, juridical capacity does not involve the capacity to act. In the procedural sphere, juridical capacity is called *capacity to act in a process* (*capacitas in iudicio agendi*: c. 1476). The capacity to act in a process is called *capacity to be in a process* (*capacitas in iudicio standi*: cc. 1478, 1505 § 2,2°, 1620,5°) or *capacity to act and respond in a process* (*capacitas in iudicio agendi et respondendi*: c. 1480 § 3). Doctrine usually calls this juridical qualification *legal capacity*. To establish the title of competence of physical persons, the determining factor is the domicile, quasi-domicile or place of residence of whoever possesses legal capacity. If the person who has the *capacitas in iudicio agendi* does not possess the *capacitas in iudicio standi*, the competence will be determined by the domicile of the person who, according to law, is obliged to undertake legal proceedings in the name of such a person (c. 1508 § 3), and whose domicile may not coincide with that of the principal. This representative must not be confused with the *procurator*, who usually coincides with the *advocate* in canon law. The procurator and advocate are legal representatives and act in the process for the person who does not require the *capacitas postulandi*.[4]

2. Cf. CPI, *Reply*, June 20, 1987, in *AAS* 80 (1988), p. 1818; Signatura, sentence *coram* CASTILLO-LARA, November 21, 1987, in *Ius Ecclesiae* 1 (1989), pp. 197–203; C. DE DIEGO-LORA, *Poder jurisdiccional y función de justicia en la Iglesia* (Pamplona 1976), *passim*; E. LABANDEIRA, "La defensa de los administrados en el Derecho Canónico," in *Ius Canonicum* 31 (1991), pp. 271–288; J. LLOBELL, "Associazioni non riconosciute e funzione giudiziaria," in W. AYMANS-K.T. GERINGER-H. SCHMITZ (Eds.), *Das konsoziative Element in der Kirche. Akten des VI. Internationalen Kongresses für kanonisches Recht. München, 14–19. September 1987* (St. Ottilien 1989), pp. 345–355; J. MIRAS, "Comentario a la respuesta de la Comisión Pontificia para la interpretación auténtica del CIC, 20 junio 1987," in *Ius Canonicum* 31 (1991), pp. 212–217.

3. Regarding "non-recognized" associations, cf. c. 310, see commentary and the preceding note.

4. Cf. J. LLOBELL, "Il patrocinio forense e la 'concezione istituzionale' del processo canonico," in P.A. BONNET–GULLO (Eds.), *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), pp. 439–446; S. PANIZO ORALLO, "Legitimación procesal y designación de curadores," in J. MANZANARES (Ed.), *Cuestiones básicas de derecho procesal canónico* (Salamanca 1993), pp. 137–157; G. RICCIARDI, "La costituzione del curatore processuale," in P.A. BONNET-GULLO (Eds.), *Il processo matrimoniale canonico*, cit., pp. 405–438; A. STANKIEWICZ, "De curatoris processualis designatione pro mente infirmis," in *Periodica* 81 (1992), pp. 495–520 and 82 (1993), pp. 477–509.

Therefore, the summons of the respondent must be notified to the person possessing the process capacity (c. 1508 § 3).[5]

2. The competence determined in cc. 1408–1414 and 1495 comes from the intent of the law, not the intent of the parties, as occurs in the voluntary jurisdiction. That is why the title of c. 1408 is binding on the respondent even if he or she is absent (c. 1561 § 2 *CIC*/1917), provided that he or she maintains the domicile or quasi-domicile when receiving the summons. Since the summons creates *perpetuatio iurisdictionis* (c. 1512,2°), a loss of the domicile or quasi-domicile that allowed the lawful summons is irrelevant.

3. Canons 100–107 determine the criteria for acquiring domicile and quasi-domicile. Since a person may possess more than one domicile or quasi-domicile, that plurality involves multiplicity of concurrent competent fora and the free election of one of them by the plaintiff (c. 1407 § 3). In any case, the existence of the domicile or quasi-domicile must be proven by the person invoking it (c. 1526 § 1). The judge has broad discretion in the ex officio verification of the veracity of the quasi-domicile invoked (c. 1452), because this title allows easy abuse, being broader than "non-precarious residence."[6] The multiplicity of parish domiciles or quasi-domiciles in the same diocese and the sole place "of origin" (c. 101) are irrelevant in the determination of the judicial competence.

4. Canon 1562 of the *CIC*/1917 established the forum of the "pilgrims in Rome," in continuity with the Roman and decretalist legislation, finding Rome to be the "common fatherland."[7] This title, in the years when the *CIC* was being drafted, gave rise to various abuses, in particular in causes of matrimonial nullity. For this reason, it has not been included in the current legislation.[8]

5. Cf. G. RICCIARDI, "La costituzione del curatore processuale," cit., pp. 423–424.
6. Cf. *CM*, no. 4 §1, b); *Comm.* 10 (1978), p. 222; c. 1488 §2; sentence *coram* HUOT, February 2, 1984, in *Il Diritto Ecclesiastico* 95/2 (1984), pp. 241–254, nos. 1, 2, 9 and 10.
7. Cf. CICERO, *De legibus*, 2, 2; *X* II, 2, 20; M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, I (Rome 1938), pp. 56–57.
8. Cf. *REU*, a. 105; *SNAS*, a. 18,4°; *Comm.* 10 (1978), p. 223.

1409 **§ 1. Vagus forum habet in loco ubi actu commoratur.**

§ 2. Is, cuius neque domicilium aut quasi-domicilium neque locus commorationis nota sint, conveniri potest in foro actoris, dummodo aliud forum legitimum non suppetat.

§ 1. A person who has not even a quasi-domicile has a forum in the place of actual residence.

§ 2. A person whose domicile, quasi-domicile or place of actual residence is unknown can be brought to trial in the forum of the plaintiff, provided no other lawful forum is available.

SOURCES: c. 1563

CROSS REFERENCES: cc. 13 § 3, 100, 107 § 2, 1071 § 1,1°, 1115, 1413,2°, 1673,3°, 1692 § 2

COMMENTARY

Joaquín Llobell

1. A physical person who lacks a domicile or quasi-domicile is a *vagus* (c. 100). A *vagus* may hold juridical patrimony and establish juridical relationships that are subject to jurisdictional protection.

A plaintiff's status as a *vagus* does not present difficulties regarding competence, in application of the principle *actor forum rei sequitur*, unless the respondent is also a *vagus* and there is no special title (c. 1409 § 2). However, it is necessary, to establish a place for receiving the acts (c. 1504,3°), which can be resolved by the appointment of a procurator residing in the territory of the tribunal.[1]

Nevertheless, a respondent's status as a *vagus* could render anyone who wishes to bring him or her to trial defenseless, since there is no special or general forum determined by domicile or quasi-domicile. To resolve the problem, and following the aphorism *ubi te invenero ibi te iudicabo*, one considers the tribunal of the place in which the *vagus* is located as his

1. Cf. *SNAS*, a. 111; *NSRR* (1982), a. 61; SECR. ST., *Ordinatio ad exsequendas Litteras Apostolicas motu proprio datas 'Iusti Iudicis,'* July 23, 1990, a. 3, in *AAS* 82 (1990), pp. 1630–1634.

or her "natural judge,"[2]constituting a subsidiary forum, incompatible with the existence of another forum.[3]

2. Although the provision of c. 1409 § 1 formulates the *vagus*' title as "general" and concurrent with the other titles of cc. 1410–1414, this commentary will refer to it as "subsidiary," since the *ratio legis* of the system of titles of relative competence (cc. 1407–1414) is to harmonize the respondent's right to defense with the plaintiff's right to judicial protection and the *favor veritatis*. The latter two objectives are achieved when there are any of the titles established in cc. 1410–1414, but the *vagus*' right to defense does not seem to be better protected by being summoned before a tribunal in which territory he or she is passing through, with the permanent status of transient being an essential element of the juridical status of the *vagus*. Moreover, in the existence of a tribunal competent due to the titles of cc. 1410–1414, the forum of the *vagus* would make it difficult to achieve the principles of judicial economy and *favor veritatis*, by separating this tribunal from the place in which some important evidence must be instructed to adapt the judicial decision to the truth.[4]

3. The risk of a lack of jurisdiction does not disappear with the forum of the *vagus*, since it may happen that, after the petition is presented before the tribunal of the place where the *vagus* is located, the summons cannot be served because the *vagus* has relocated. That is why the plaintiff's forum is accepted, the nature of which is dually successive or subsidiary: lack of the general or special forum, and of the first subsidiary title, that of the *vagus*. The Code Commission affirmed this when it rejected the inclusion of the plaintiff's forum not only as a general title of competence, but also as a forum concurrent with that of the place where the *vagus* is located.[5] Is the plaintiff's forum from c. 1409 § 2 that of his or her domicile or quasi-domicile, or just of the domicile? Since this paragraph did not exist in the *CIC*/1917, the issue was not studied by the respective doctrine. Canon 9 § 2 of the *Schema* of 1976 allowed the quasi-domicile; its deletion by the Commission does not seem to be due to a desire to avoid it but to simplify the wording.[6] Nevertheless, according to the interpretative norm of c. 18, when it is impossible to establish the legislative intent, the parallel location to be invoked in this case is c. 1673,3°, which only indicates the plaintiff's domicile. This interpretation finds support in a classic interpretative norm: "Quum sunt partium iura obscura, reo favendum est

2. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, I (Rome 1938), p. 57.
3. Cf. F. ROBERTI, *De processibus*, I, 2nd ed. (Rome 1941), no. 68, p. 199.
4. Cf. c. 1452 §2; JOHN PAUL II, *Address to the Roman Rota*, January 28, 1994, in *L'Osservatore Romano*, January 29, 1994, p. 5, *passim* (English edition: February 2, 1994, p. 2).
5. Cf. *Comm.* 10 (1978), pp. 222–223; c. 1673,3°.
6. Cf. *Comm.* 10 (1978), p. 223.

potius quam actori" (*VI Regula iuris* 11), although another aphorism in favor of the opposite interpretation can be quoted: "ubi lex non distinguit, nec nos distinguere ebemus." The English version of these rules would read: "when the rights of the parties are uncertain, they must favor the respondent, not the plaintiff" and "where law makes no distinction, we have no reason to make a distinction."

1410 **Ratione rei sitae, pars conveniri potest coram tribunali loci, ubi res litigiosa sita est, quoties actio in rem directa sit, aut de spolio agatur.**

Competence by reason of subject matter means that a party can be brought to trial before the tribunal of the place where the subject matter of the litigation is located, whenever the action concerns that subject matter directly, or when it is an action for the recovery of possession.

SOURCES: c. 1564

CROSS REFERENCES: cc. 13 § 2,2°, 1192 § 3, 1254–1272, 1375–1377, 1496–1500, 1729

COMMENTARY

Joaquín Llobell

1. In current canon law, the forum of the thing is concurrent with the general forum, and it can be the general forum with that of the contract or crime. The canon does not consider the thing to be a party to the process, because when a thing possesses juridical personality, as such it has a right to the general forum determined in its bylaws (cc. 114 § 1, 115, 1480). The canon considers the thing to be the direct object of the process, which is why it requires that the action be real (*in rem directa*) or ordered to the recovery of the thing of which one has been dispossessed. Nonetheless, this dispossession does not constitute a crime in and of itself, and the dispossessed person does not have to prove the title by which the thing was possessed. In the *CIC*/1917, the act of dispossession constituted a necessary forum (c. 1560,1°) and was not concurrent with the general forum.

A dispossession action can be exercised by anyone who claims to have possessed a thing of which he or she has been divested by the respondent "by violence or secrecy" (cf. *CIC*/1917 c. 1698), taking into account the canonization of the civil law set forth in c. 1500.

2. The forum of the thing seeks to facilitate repair of the injustice suffered. In the place where the thing is located, it is easier to protect it from possible damage or abuse on the part of the person who possesses it at that moment, through its sequestration (cc. 1496 § 1, 1498, 1499) or other preventive measures, adopted in the application of c. 1512,1°. Moreover, it facilitates instruction of the evidence and execution of the judgment (c. 1655 § 1). In short, as with other special fora, this forum seeks to apply the principle of judicial economy: carrying out the process "citius, melius ac minoribus sumptibus" ("most quickly, most fairly and with the least effort").

3. The action *in rem directa*, unlike that of dispossession, seeks to obtain a judicial definition on the real juridical title in dispute: ownership, usufruct, possession, or other rights to the thing of another. When the main object of the dispute is the obligation of a person in connection with a thing, or the terms of the contract from which such an obligation derives, the action is not real but personal, giving place to the special fora established in c. 1411. In 1917, the Code Commission excluded mixed actions[1] and the situation has not been modified in 1983; however, the connection allows an accumulation of real and personal actions in these situations.

4. The thing can be in the territory of more than one diocese at the same time, in which case the principles of prevention and of connection between the tribunals of the various dioceses are applied (cc. 1414 and 1415). The possibility of this phenomenon is evident if the thing is immovable, but it can also arise with respect to a divisible movable thing. The moral unity of the object also allows invoking the competence of more than one tribunal, according to the criteria of connection and of prevention, and respecting the norms on prescription (cc. 197–199, 1268–1270, 1492, 1512,4°).

With respect to movable things, doctrine has debated whether both the tribunal of the place where the thing is found "usually" and the tribunal of the place "in passing" are competent.[2] This commentary translates *permanendo* as "usually," because using the expression "permanently" with a movable thing[3] may imply a *contradictio in terminis*. If one accepts that the real forum is applied either to movable or to immovable things, which is *communis doctorum sententia* (c. 19), there is no problem in declaring the competence of the tribunal of the place in passing, because this quality belongs to the essence of movable things (cf. c. 124 § 1). The decision of the Code Commission to reject the change in c. 1564 of the *CIC*/1917 (the proposal was to say *invenitur* instead of *sita est*)[4] implies only the desire to use a classical expression, not an exclusion of the forum of the place in passing.

5. In these causes, with respect to aspects not regulated by canon law, civil law applies (cf. cc. 22, 1284 § 2,3°, 1286,1°, 1290).

1. Cf. F. Roberti, *De processibus*, I, 2nd ed. Rome, 1941, no. 69, p. 201, note 2.
2. Cf. M. Lega-V. Bartoccetti, *Commentarius in iudicia ecclesiastica*, I (Rome 1938), p. 45; F. Roberti, *De processibus*, cit., no. 69, p. 202.
3. Cf. M.J. Arroba, *Diritto processuale canonico* (Rome 1993), p. 100.
4. Cf. *Comm.* 10 (1978), p. 224.

1411 **§ 1. Ratione contractus pars conveniri potest coram tribunali loci in quo contractus initus est vel adimpleri debet, nisi partes concorditer aliud tribunal elegerint.**

§ 2. Si causa versetur circa obligationes quae ex alio titulo proveniant, pars conveniri potest coram tribunali loci, in quo obligatio vel orta est vel est adimplenda.

§ 1. Competence by reason of contract means that a party can be brought to trial before the tribunal of the place in which the contract was made or must be fulfilled, unless the parties mutually agree to choose another tribunal.

§ 2. If the case concerns obligations that arise from some other title, the party can be brought to trial before the tribunal of the place in which the obligation arose or in which it is to be fulfilled.

SOURCES: § 1: c. 1565; CodCom Resp. XII, 14 iul. 1922 (*AAS* 14 [1922] 529)

CROSS REFERENCES: cc. 1290–1298

COMMENTARY

Joaquín Llobell

1. Canon 1290 canonizes the civil legislation related to contracts and obligations.[1] The obligation is the enforceable juridical duty that a subject has to perform a service for another subject. Various juridical systems have undergone an evolution with respect to the juridical facts in which law recognizes a binding potentiality. The prevailing tradition, built on Roman law, considers contracts, crimes, quasi-contracts, quasi-crimes, and law to be sources of obligations. To protect what in civil law is called "good faith"—equivalent to the *ex bono et aequo* in canon law (cc. 122, 1580, 1718 § 4)—doctrine indicates other sources of obligations: a unilateral declaration of intent and non-negligent acts that can be compensated.[2] Obligations derived from the execution of a judgment are governed by their own norms: cc. 1650–1655, especially c. 1655 § 2. Since canon law

1. Cf. c. 22; M. LÓPEZ ALARCÓN, commentary on c. 1290, in *Pamplona Com.*
2. Cf. F. SANCHO REBULLIDA, "Obligación. 2) Derecho civil," in *Gran Enciclopedia Rialp*, XVII, 5th ed. (Madrid 1987), pp. 174–190.

recognizes the binding value not only of law *stricto sensu*, but also custom (c. 23) and, in the event of a lacuna in the law—suppletory norms (c. 19)—the judge is required to have considerable juridical sensitivity and education to resolve the dispute the parties submit to him regarding an obligation, without resorting to considering that the issue exceeds the jurisdictional scope of the Church (c. 1457 § 1). These canonical disputes involve one of the subjects foreseen in c. 1405 § 3; therefore, competence belongs to the Roman Rota.

2. Canon 1411 § 2 establishes a potential double forum for all obligations resulting from a contract or other title: the place where the obligation arose and the place it must be fulfilled. If these places correspond to the jurisdiction of two tribunals, there will be two concurrent fora that may differ from the general forum of the domicile or quasi-domicile of the respondent. The concurrent fora can increase when the obligation arose or must be fulfilled in a territory subject to two or more jurisdictions. As always, if there are concurrent fora, competence is determined by prevention (c. 1415). On the other hand, by virtue of connection (c. 1414), these personal fora may be absorbed by the real forum (c. 1410), or vice versa.

3. As a result, the actual specificity of the forum of the contract (c. 1411 § 1), regarding non-contractual obligations, is limited to the last clause of the paragraph: "unless the parties mutually agree to choose another tribunal." In the first place, this clause applies to sources of unilateral as well as bilateral obligations, because the bilateralism or unilateralism refers to the resulting obligations, not to the necessary presence of, at least, two parties. In fact, bilateralism is an essential element of the juridical transaction called the *contract*, when it is constituted. Constitutive bilateralism allows the term *contract* of c. 1411 to also include *quasi-contracts* (business management, guardianship, etc.) and any agreement from which an obligation results.[3] Nevertheless, this forum does not apply in a matrimonial cause, because, even if the constitutive act of marriage possesses a contractual nature (c. 1057), these causes are regulated by special titles (cc. 1673 and 1694): *generi per speciem derogatur.*[4] Therefore, with regard to the forum of the contract (c. 1411), references to interpretative criteria (from the various dicasteries of the Roman Curia) regarding the competence of matrimonial causes (c. 1673) can give rise to confusion. The proper place to analyze these criteria or norms is only in c. 1673,1°.

4. The specific forum of the contract, set forth in the last clause of c. 1411 § 1, constitutes the only vestige of the expansion of competence in

3. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, I (Rome 1938), p. 61.

4. *VI Regula iuris* 34. Cf. D. 50, 17, *regula iuris* 80; *CIC* c. 20. In a different sense, cf. P.V. PINTO, *I processi nel codice di diritto canonico. Commento sistematico al Liber VII* (Vatican City 1993), no. 30, p. 77.

the current Latin Code. Nevertheless, as was extensively debated by scholars of the *CIC*/1917,[5] the indication of the correlative c. 1565 § 2 has no declarative value for the efficacy of the will of the parties to confer competence to a non-competent judge but has a constitutive value. That is, the law establishes a new title, in which the will of the parties has value because the law so determines.[6] However, the expansion of competence seems to be provided in c. 1080 of the *CCEO*, although, according to the same canon, it does not apply to matrimonial causes, because the *forum prorogationis* can be invoked only as an alternative to the titles indicated in cc. 1073–1079, while the titles of competence for matrimonial causes of nullity are established in cc. 1359 and 1380.

5. The generic forum of obligations is concurrent with the forum of the domicile or other existing fora: the law uses the expression *conveniri potest* to indicate the concurrence. Nevertheless, the specific forum of the contract (c. 1411 § 1,2nd part) uses the expression *nisi* which, in its literal meaning (c. 17), can be interpreted as nullifying (cf. c. 39) other concurrent fora, or at least of the two that can derive from the forum of the obligations. If the specific forum of the contract nullifies the other fora of the obligations, with respect to the latter, it will possess the nature of a special forum or, according to the terminology of c. 1560 of the *CIC*/1917, "necessary" forum; and the other hypothetical concurrent tribunals will become non-competent, even if the nature of their non-competence is relative (see c. 1407 § 2 and the introduction to the title). Current doctrine has not chosen a uniform interpretation. Acebal believes that "it is clear that ... the forum chosen by the parties by mutual agreement is concurrent with the other fora ... [although] the contradictory nature of the text could lead one to believe otherwise."[7] Arroba, on the other hand, affirms the nullifying nature of the forum of the contract with respect to those of the obligations, not with respect to the general forum.[8] Acebal position is justifiable because it seems that the Code Commission tried to establish three concurrent options, without the third (the forum of the contract) prevailing over the other two, except when the respondent is absent from the place where the contract was entered into or must be fulfilled.[9] In this

5. Cf. M. CABREROS DE ANTA, "La prórroga de la competencia judicial y el fuero de la conexión," in *Revista Española de Derecho Canónico* 10 (1955), pp. 325–351; idem, *Comentarios al Código de Derecho Canónico*, III (Madrid 1964), pp. 228–231; M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, I..., cit., pp. 70–74; F. ROBERTI, *De processibus*, I, 2nd ed. (Rome 1941), nos. 60–61 and 71, pp. 174–178 and 205–207; P. TORQUEBIAU, "Compétence des divers tribunaux ecclésiastiques," in *Dictionnaire de Droit Canonique*, III (Paris 1942), cols. 1217 and 1227–1229.

6. Cf. J. LLOBELL, "Centralizzazione normativa processuale e modifica dei titoli di competenza nelle cause di nullità matrimoniale," in *Ius Ecclesiae* 3 (1991), pp. 469–477.

7. Cf. J.L. ACEBAL LUJÁN, commentary on c. 1411, in *Salamanca Com.*

8. Cf. M.J. ARROBA, *Diritto processuale canonico* (Rome 1993), p. 101.

9. Cf. *Comm.* 10 (1978), p. 225.

latter situation, according to the *CIC*/1917 (c. 1565),[10] only the forum of the contract could be invoked, not that of the obligations. In the current wording of the canon, the clause *nisi* is only a throwback to the former provision. The position of Arroba, in addition to interpretative reasons internal to the Code, is more realistic, because, in the area of contracts, the *CIC* canonizes the civil legislation (cc. 1290 and 22), which usually grants nullifying force to the forum of the contract, thus conferring procedural relevance to private autonomy in the area of the free will of the parties. Therefore, the forum established by the parties in the contract nullifies the generic double forum of the obligations when indicated in the stipulated agreement, in that this possibility has not been excluded from c. 1411 § 1,2nd part (cf. c. 18).

6. The second part of c. 1411 § 1 has modified other aspects of the forum of the contract in the *CIC*/1917. According to c. 1565 § 2, this title could only be established *in actu contractus* and be invoked to settle the specific disputes foreseen in said agreement. In the current norms, the selection of the title can take place at any time before the summoning of the respondent, at which time "the thing (the conventional freedom of the contracting parties) is no longer whole" and the *perpetuatio iurisdictionis* takes effect (c. 1512,1° and 2°). The competence of the tribunal of the contract includes any dispute that directly concerns the contract.[11]

10. Cf. CPI, *Responsum XII*, July 14, 1922, in *AAS* 14 (1922), p. 529.
11. Cf. *Comm.* 10 (1978), p. 225.

1412 In causis poenalibus accusatus, licet absens, conveniri potest coram tribunali loci, in quo delictum patratum est.

A person accused in a penal case can, even though absent, be brought to trial before the tribunal of the place in which the offence was committed.

SOURCES: c. 1566

CROSS REFERENCES: cc. 1341–1353, 1362 § 1,1°, 1717–1731

COMMENTARY

Joaquín Llobell

1. The forum of the offense is established not only for reasons of judicial economy when there are other concurrent fora but, more importantly, to serve the *salus animarum* (c. 1752) by trying to repair the damage and scandal suffered by the community where the offense was committed. For this reason, although it is a forum concurrent with the general forum, doctrine states that it is a quasi-necessary title,[1] and the canon stresses the application of this title even if the respondent is absent (cc. 1592 and 1593). In fact, the Code Commission considered the appropriateness of establishing the forum of the offense as a necessary forum, although it decided to respect its nature as concurrent with the general forum.[2]

2. The forum of the offense arises where the penally punishable offense took place, even in cases of attempted and unsuccessful offenses (c. 1328). The forum of the offense can give rise to the competence of more than one tribunal, such as with jointly committed (c. 1329) and continuous offenses; in this case, the criterion of prevention is applied (c. 1415). Preventive measures for preventing the offense (c. 1312 § 3) or mitigating the consequences of a hypothetically penal act (c. 1722) are not punishments, and it devolves upon the administrative authority to apply them, not the tribunal.[3]

3. In penal processes, the plaintiff is the promoter of justice, after the prior decision of the ordinary (c. 1721). When an offense is committed, especially if it causes grave harm to souls, the ordinary cannot disqualify himself or try to transfer the responsibility of bringing a penal

1. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica,* I (Rome 1938), pp. 64–65 and 67.
2. Cf. *Comm.* 10 (1978), p. 225.
3. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica,* I, cit., p. 66.

process (cf. c. 1342 § 2) to the Holy See. Evidently, this reasoning is applicable to sanctions that can be imposed through administrative channels.[4]

4. The offenses reserved to the CDF are exempt from the general norms on prescription of penal actions (c. 1362 § 1,1°). To understand the scope of this reservation, recourse to the *ius vetus* is essential, because the current one refers to norms that are prior to the *CIC*. *Pastor Bonus* 52 states that the CDF is governed by norms of common law and proper law. Considering the partial knowledge available on proper norms[5] and the silence of the *CIC*, it is legitimate to resort to information offered by the *CIC*/1917 (cf. c. 6 § 2) on this issue. Canon 1555 § 1 established that this Congregation, through judicial channels, "proceeds according to particular practices and statutes and retains its own customs; and even lower tribunals, in causes belonging to the Holy Office [the current CDF], must follow the norms pronounced by it." Therefore, the reservation was not absolute, because the canon referred expressly to the tribunals of the local ordinary (c. 247 § 2), because c. 501 § 2 "strictly prohibits all religious Superiors from interfering in the causes pertaining to the Holy Office." In these causes, judgments at the first instance by lower tribunals were not appealed before local appellate tribunals or before the Roman Rota, but only before the Holy Office.[6] Presently, the system for these causes before the CDF is that described by proper *procedural* laws,[7] even if they are antecedent to the *CIC*, since they were not repealed by c. 6 § 1 (cf. cc. 20 and 21).

5. The forum of the offense gives the tribunal competence to judge the contentious action for compensation of damages, in which the plaintiff can be the person claiming to have suffered non-penal damage, as a result of the possible offense committed by the respondent (cc. 1729–1731).

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4. Cf. V. Gómez-Iglesias, "Acerca de la autoridad como servicio en la Iglesia," in PCILT, *"Ius in vita et in missione Ecclesiae." Acta Symposii Internationalis Iuris Canonici, in Civitate Vaticana celebrati diebus 19–24 aprilis 1993* (Vatican City 1994), pp. 193–217.

5. Cf. SCDF, *Agendi ratio in doctrinarum examine*, January 15, 1971, in *AAS* 63 (1971), pp. 234–236; C. de Diego-Lora, "Procedimientos para el examen y juicio de las doctrinas," in *Estudios de derecho procesal canónico*, III (Pamplona 1990), pp. 213–312.

6. Cf. Benedict XIV, Ap. Const. *Sacramentum Poenitentiae*, June 1, 1741, published as the fifth document complementary to the *CIC*/1917, in *AAS* 9 (1917, 2nd part), pp. 505–508. I. Noval (*Commentarium Codicis Iuris Canonici. Liber IV. De processibus, Pars I, De iudiciis* (Augustae Taurinorum-Romae 1920), no. 51, p. 28) cites other complementary norms regarding the delict of "sollicitatio ad turpia" in the confession, as defined in the current c. 1387.

7. Cf. *PB* 52; RGCR 128 §2; U. Navarrete, "Commentarium ad litt. ap. 'Integrae servandae' 7 dec. 1965 mp datas," in *Periodica* 55 (1966), pp. 647–652.

1413 Pars conveniri potest:

1° in causis quae circa administrationem versantur, coram tribunali loci ubi administratio gesta est;

2° in causis quae respiciunt hereditates vel legata pia, coram tribunali ultimi domicilii vel quasi-domicilii vel commorationis, ad normam cann. 1408–1409, illius de cuius hereditate vel legato pio agitur, nisi agatur de mera exsecutione legati, quae videnda est secundum ordinarias competentiae normas.

A party can be brought to trial:

1° in cases concerning administration, before the tribunal of the place in which the administration was exercised;

2° in cases concerning inheritances or pious legacies, before the tribunal of the last domicile or quasi-domicile or residence of the person whose inheritance or pious legacy is at issue, in accordance with the norms of Cann. 1408–1409. If, however, only the execution of the legacy is involved, the ordinary norms of competence are to be followed.

SOURCES: c. 1560,3° et 4°

CROSS REFERENCES: cc. 239, 494, 636, 1273–1289, 1299–1310

COMMENTARY

Joaquín Llobell

1. Canon 1413,1° establishes the forum of the administration of goods. The assumption is that the administrator is not the owner of the administered goods. The administrator does not have to be a physical person. It can be a juridical person that will act through the physical person who is its representative. In turn, the owner can be a physical or juridical person. The administrator can be appointed by the owner of the goods or by law.

The object of the dispute determining this forum is not the goods as such, but the administration of them.[1] It may be that the seat of administration, from which a special title of competence proceeds, does not coincide with the domicile or quasi-domicile of the administrator, giving rise to

1. In this sense, cf. J.L. ACEBAL LUJÁN, commentary c. 1413, in *Salamanca Com.* To the contrary, cf. M.J. ARROBA, *Diritto processuale canonico* (Rome 1993), p. 103.

a forum concurrent with the general forum. In fact, c. 1413 uses the expression *conveniri potest.* If the dispute refers also to goods considered in themselves, and the goods are found in a territory other than that of the administration and domicile of the respondent (the administrator, the owner, etc.), then by virtue of the connection (c. 1414) there will arise one or more concurrent fora, between which prevention must be applied (c. 1415). The Code Commission tried to expressly consent to the concurrence of the forum of the administration with other possible fora and modifying the nature of the necessary forum foreseen in c. 1560,3° of the *CIC*/1917.[2]

2. Canon 1413,2° establishes the forum of succession *mortis causa.* It is a special forum for resolving disputes arising through patrimonial transfers, not only of movable and immovable material goods, but also of immaterial goods (such as an honorific title), the title of which is *mortis causa* (c. 1299). This title presupposes the death of a physical person.[3] When this transfer, even if it is free, is *inter vivos*, the dispute will devolve upon the forum of the obligations (c. 1411). The difference between the status of *heir* versus *legatee* is not quantitative, but qualitative. The heir succeeds the deceased in his or her generic juridical situation in the proportion determined by law or the will, discounting the legacies. The legatee succeeds the deceased only with respect to one or more of the juridical goods (the legacy), of which the deceased person was holder. It may occur that a legacy is quantitatively greater than the rest of the patrimony transferred to the heirs.

3. The titles of succession *mortis causa* can proceed from law or from the intent of the deceased expressed through the will. Civil law determines the destination of the patrimony of the deceased or of all his or her goods, when he or she died without a will. The methods and requirements of the will are governed by civil legislation; nevertheless, when there is evidence of the deceased's desire to transfer some patrimony in benefit of the Church, then, having been omitted, "the formalities of the civil law are as far as possible to be observed. If these formalities have been omitted, the heirs must be advised of their obligation to fulfil the intention of the testator" (c. 1299 § 2). This obligation is not only a moral obligation, but also a juridical one. Therefore, anyone who feels prejudiced by the assignment of the goods of the deceased according to merely civil criteria, may resort to the competent ecclesiastical tribunal. It is evident that the *punctum dolens* of the issue is the execution of the canonical judgment, regardless of whether the judge has scrupulously applied civil law on succession or has pronounced the judgment basing it on a statement of the deceased's intent not in accordance with the provisions of civil law. The coercive measures of the Church lack any force other than

2. Cf. *Comm.* 10 (1978), p. 226.
3. Regarding the extinction of "juridical persons," cf. cc. 120, 123, 320, 326, 616, etc.

that which comes from the specific binding nature of its decision, except when the civil system makes them its own (e.g., in Spain and Italy, judgments of nullity of marriage, after the respective *exequatur* or *delibazione*), which does not occur in successions *mortis causa*. Although the efficacy of the canonical process may seem non-existent, the binding spiritual force is sufficient to satisfy the requisite of coercion for a system, because that coercion is more effective than it might seem on the surface. This does not prevent good sense and judicial economy from calling for an adaptation of canonical decisions to civil decisions and even referring to state tribunals all causes that can be resolved by them more easily and effectively, provided they respect the specific justice criteria of the canonical system.

4. Canon 1413,2° establishes that the last domicile, quasi-domicile, or place of residence of the deceased person determines the forum of succession. It is clearly a matter of a forum concurrent with the general forum of the respondent, which is why the forum of the plaintiff cannot be invoked (c. 1409 § 2).[4] Canon 1560,4° of the *CIC*/1917 determined what the necessary forum was and contemplated only the domicile of the testator. What is the scope of the extension to the quasi-domicile and the place of residence introduced by the Code Commission[5]? There was an attempt to establish a plurality of fora of succession concurrent with each other: as many fora as domiciles and quasi-domiciles that the deceased had at the time of death, in addition to the place where he or she died. Inasmuch as the will is an essentially revocable act, the new norm seeks to give competence to the tribunal of the place where the testator could manifest his or her last will. Those tribunals may easily examine evidence of the existence, lawfulness, and content of that last will, because it is useful to recall that the common denominator of all special fora is to facilitate examination of the evidence. For this reason, doctrine of the *CIC*/1917 included in the term *domicile* the last regular residence of the deceased.[6] What is of interest is facilitating knowledge of the last will to resolve any disputes that may arise and to elucidate the very existence of that will. For that, in view of the eventuality that the act has been performed in the place of death, in which there was neither a domicile nor quasi-domicile, the tribunal of the last place of residence is accepted, even if the deceased possesses one or more domiciles or quasi-domiciles. This facilitates the judgment on the last will and testament, which revokes prior ones, in full or in part. This interpretation authorizes the concurrence of the tribunal of the place of residence where the testator died with all those places where he or she possessed a domicile and quasi-domicile at the time of

4. To the contrary, cf. J.L. ACEBAL LUJÁN, commentary on c. 1413, cit. The forum of the plaintiff was explicitly excluded in this title by the codification commission: cf. *Comm.* 10 (1978), p. 226.
5. Cf. *Comm.* 10 (1978), p. 226.
6. Cf. F. ROBERTI, *De processibus*, I, 2nd ed. (Rome 1941), no. 65, pp. 191–192.

death.[7] If protection of the inheritance is of interest to the public good, it will be necessary for the promoter of justice to be present (cc. 1430 and 1431).

5. The forum of successions is applied to disputes on the value and scope of the will, the division of the estate, the determination of a legacy indicated imprecisely by the testator or incompatible with the rights of the heirs, the activity of the executor of the will, the satisfaction of the interests of the deceased's creditors, liquidation of the inheritance, etc. Once these issues are resolved, if the dispute relates only to execution thereof, the forum of c. 1413,2° lapses and the respective tribunals are competent: "only the execution ... the ordinary norms of competence are to be followed." These tribunals will be that of the general forum (c. 1408), that of the place where the thing is (c. 1410), that of the place where the agreement on the division of the estate among the heirs was entered into (c. 1411 § 1), etc.

7. In this same sense, cf. J.L. ACEBAL LUJÁN, commentary on c. 1413, cit.; L. DEL AMO, commentary on c. 1413, in *Pamplona Com.* Against the concurrence of different titles of the sequences, cf. M.J. ARROBA, *Diritto processuale canonico*, cit., pp. 103–104.

1414 **Ratione conexionis, ab uno eodemque tribunali et in eodem processu cognoscendae sunt causae inter se conexae, nisi legis praescriptum obstet.**

By reason of connection, cases that are inter-connected are to be heard by one and the same tribunal and in the same process, unless this is prohibited by a provision of the law.

SOURCES: c. 1567

CROSS REFERENCES: cc. 1406, 1440, 1493, 1494 § 1, 1587–1589, 1625, 1639 § 1, 1683

COMMENTARY

Joaquín Llobell

1. Canon 1414 provides that causes connected to each other should (*cognoscendae sunt*) be judged by only one tribunal in each process, unless this is prohibited by a provision of law. Does this establish a title of competence or, as occurs with prevention (c. 1415), merely indicate which tribunal is competent in the specific case? The problem is part of the numerous *quaestiones disputatae* on which procedural doctrine is not unanimous.[1]

Recently, Arroba has maintained that connection is one of the ways of determining competence between tribunals to which the law entrusts a given cause.[2] However, this commentator author believes it is always a matter of the respondent's right to file an exception so that a cause, initiated before a competent tribunal, will be transferred to another competent tribunal when the latter has already begun to hear a connected cause, with the first tribunal having achieved (with respect to the earlier dispute) *the perpetuatio iuridictionis* (c. 1512,2°). In short, the connection would make the competence of a competent tribunal lapse, not create a new title of competence. Thus, connection is a true title of competence, which law grants to an ordinary or delegate[3] tribunal that would be non-competent

1. For an overview of the different problems and solutions in doctrine, cf. M. CABREROS DE ANTA, "La prórroga de la competencia judicial y el fuero de la conexión," in *Revista Española de Derecho Canónico* 10 (1955), pp. 325–351.

2. Cf. M.J. ARROBA, *Diritto processuale canonico* (Rome 1993), pp. 110–114.

3. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, I (Rome 1938), p. 78.

without it. Canon 1407 § 1 expressly states that it is a true title of competence and not of expansion, even if it is defined as legal, nor of a way to determine competence. This canon, by excluding prevention but not connection of the list of titles of relative competence,[4] has modified c. 1559 § 1 of the *CIC*/1917 and allows a distinction in the nature of both institutions. Connection is a title of competence, and prevention is a way of determining that connection when there is more than one tribunal with concurrent competence, because they possess some title. Both codes are identical with respect to how they view the concept of expansion, as the modification of titles of relative competence, which only devolves upon the dicasteries of the Roman Curia.[5]

2. The forum of connection is based on judicial economy. However, this title assumes a plurality of disputes, each of which can be the object of a different process before the respective competent tribunal. The forum of the connection arises when the respective processes and the judgments that conclude them possess common elements that are useful or necessary to satisfy not only the principle of economy but also that of procedural harmony: that all judicial decisions on interconnected disputes be coherent and contribute to ordering according to justice said juridical relationships, with the least effort possible from the parties and from the tribunal: *citius, mellius ac minoribus sumptibus.*

3. The object of a process must be perfectly delimited in the decree of *litis contestatio* (c. 1513 § 1) and decided in the judgment (c. 1611,1°). Three elements individualize each dispute (c. 1641,1°). Two are of an objective nature: the asset in dispute (the *petitum*) and the cause originating the litigation (the *causa petendi*). The third element is of a subjective nature: the parties to the process. When these three elements coincide in two petitions (c. 1504,1° and 2°), there is a single action. The canonical system prohibits this multiplicity of processes at the same grade or instance concerning the same action. The prohibition comes from the principle *ne bis in idem* and originates various institutions that protect it: prevention (c. 1415), *perpetuatio iurisdictionis* (c. 1512,2°), the situation of *litis pendentia* (c. 1513,5°) or *litis finitae* and the respective exceptions (cc. 1459 § 1, 1462), the ex officio declaration of adjudged matter by the judge (c. 1462 § 1), functional absolute non-competence that is sanctioned with irremediable nullity of the judgment (c. 1620,1°), *restitutio in integrum* against a judgment that "runs counter to a preceding decision

4. Cf. *Comm.* 10 (1978), p. 221.

5. Cf. Secr. St., *Ordo servandus in Sacris Congregationibus Tribunalibus Officiis Romanae Curiae*, September 29, 1908, 2nd part, ch. 7, a. 3, no. 11, a), in *AAS* 1 (1909), pp. 36–108; Signatura, *Appendix ad Regulas servandas in iudiciis apud Supremum Signaturae Apostolicae Tribunal*, November 3, 1915, arts. 3–32, in P. Gasparri-I. Seredi, *Codicis Iuris Canonici fontes*, VIII (Rome 1938), pp. 608–618; *CIC*/1917 cc. 249 §3, 1603 §2; *CIC* c. 1445 §3,2°; *PB* 24,2° and 3°; see the introduction to the title.

which has become an adjudged matter" (c. 1645 § 1,5°), etc. Nevertheless—at least before the decree of *litis contestatio* (cc. 1459, 1513)—there is a connection between two causes, provided they coincide in one or two of the three elements: *objective* connection if the coinciding elements are the *petitum* and the *causa petendi*, and *subjective* connection where the parties coincide.

4. The forum established by c. 1414 is only applicable to objective connection. Subjective connection is regulated in cc. 1493 and 1494. In a process on the validity of the matrimonial bond, the *petitum* is the judicial declaration regarding the existence or non-existence of a valid bond, the *causa petendi* is the reason why the bond might not exist despite having celebrated a matrimonial rite, and the *parties* are the man and woman who entered marriage and the defender of the bond (cc. 1432, 1677 § 3), except in the exceptional cases of cc. 1674,2° and 1675. In these causes, in which the *petitum* and the parties coincide, each *causa petendi* originates a different action (c. 1677 § 3), which is determinant for achieving the conformity of two judgments of different grades (cc. 1641,1°, 1644 § 1, 1683, 1684).[6] The connection between the penal process and that for reparation of damages is provided in c. 1729, respecting the grade of the instance (§ 2). This system foresees the appropriateness of each action being handled in separate processes, while respecting the principle of the identity of the tribunal (c. 1730). This structure occurs with the connection in the counteraction, for which separation in processes is also allowed (cf. cc. 1494 § 1 and 1463 § 2).

5. The *CIC*/1917 expressly offered (c. 1567) a procedural method similar to the connection and to the dependency of actions. This common procedural treatment of both institutions has involved the non-mention of the latter in c. 1414 of the *CIC*.[7] Nevertheless, dependency is a useful institution for legally defining some specific kinds of connection, especially in matrimonial causes.[8]

There is dependency when the parties and the *causa petendi* coincide and, regarding the *petitum*, there is only a quantitative difference, being also qualitatively coincident: the *petitum* is the same with respect to the party included in both actions. These two actions are not identical, but their mutual *relationship* is so determinant for procedural harmony that they should not be able to be handled simultaneously in two processes nor, with more reason, before two different tribunals. The merely objective connection, which does not compromise the validity of the judgment

6. See the introduction to the title regarding marriage cases.
7. Cf. *Comm.* 10 (1978), p. 227.
8. Cf. sentence *coram* HUOT, February 2, 1984, in *Il Diritto Ecclesiastico* 95/2 (1984), pp. 241–254; GULLO, "Note minime in tema di 'prorogatio competentiae ratione continentiae,'" in *Il Diritto Ecclesiastico* 95/2 (1984), pp. 241–254.

given by a tribunal that disregarded the forum of the connection, is protected with an exception that devolves only upon the parties to lodge before the *litis contestatio* of the second action (c. 1459 § 2). Nonetheless, dependency deprives the second judge of competence, who then becomes absolutely non-competent by virtue of the *perpetuatio iurisdictionis* and the *litis pendentia* (even if they are partial). These situations are protected with the respective exceptions and with the sanction of nullity of the judgment (c. 1620,1°), which is why exceptions are not subject to the term of the *litis contestatio* and can be assessed ex officio by the same judge (cc. 1459 § 1, 1461 and 1462 § 1).

There is also dependency in incidental matters of a pre-judicial nature for which the tribunal of the main action is competent, at least through the forum of connection (c. 1588), unless the pre-judicial cause involves a title of absolute or necessary competence.[9] In this latter situation, *perpetuatio iurisdictionis*, which involves some title of competence (c. 1512,2°) cannot be invoked, nor can *litis pendentia*; it is necessary to suspend the case in chief until this incidental matter is judged by the competent tribunal.

6. Because of the unitary procedural treatment of connection and dependency, authors do not distinguish the regulation of the exceptions that protect them. With respect to their names, some distinguish that of the connection of the *litis pendentia* (this latter would apply only to dependency)[10]; others use both terms without distinction.[11] For some, the exception of connection is a right of the parties, and only they can file it before the *litis contestatio* (c. 1459 § 2), because disregard for the connection, in itself, does not involve "a gravely unjust judgment" (c. 1452 § 2).[12] For others, the imperative tone of c. 1414 (*cognoscendae sunt*) prevails, because it is a special norm (*generi per speciem derogatur*[13]) on the time limit of the *litis contestatio* established in c. 1459 § 2, and the exception can also be declared or requested ex officio by the judge.[14] This author believes that consistency with the statement that objective connection is a special forum of relative competence (c. 1407 § 1), with the same nature as others established in cc. 1410–1413, demands accepting the proper institutions of these fora and trying to avoid distorting the idiosyncrasy of each institution and procedural concept. In that

9. Cf. M. CABREROS DE ANTA, "La prórroga de la competencia judicial…," cit., pp. 347 and 350.

10. Cf. L. DEL AMO, commentary on c. 1415, in *Pamplona Com.*; F. ROBERTI, *De processibus*, I, 2nd ed. (Rome 1941), no. 79, p. 217.

11. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, I, cit., pp. 75–78.

12. Cf. M.J. ARROBA, *Diritto processuale canonico*, cit., pp. 112–113.

13. D. 50, 17, *regula iuris* 80; *VI regula iuris* 34.

14. Cf. M. CABREROS DE ANTA, "La prórroga de la competencia judicial…," cit., pp. 339–340 and 348; L. DEL AMO, commentary on c. 1414, cit.; F. ROBERTI, *De processibus*, cit., no. 75, pp. 212–213.

connection, there is an essentially concurrent forum for different and autonomous actions, for which only reasons of convenience would dictate simultaneous treatment. The exception of connection cannot modify the common criteria for exceptions that do not result in nullity of the judgment, which prevents their lodging after the *litis contestatio* (c. 1459 § 2). The formulation of c. 1452 § 2 possesses a scope that allows the judge to lodge and decide the exception ex officio. On the other hand, while for one writer the *vis attractiva* of connection cannot overcome the chronological criterion that comes from prevention,[15] for others, c. 1414 imposes the accumulation of connected processes initiated separately in various tribunals, without the prevention impeding this accumulation. According to this interpretation, the *nisi legis praescriptum obstet* of c. 1414 only refers to the absolute non-competence of the tribunal or to the ineptitude of the process for deciding the connected cause.

7. Canon 1493 foresees, with some limits, the possibility of an accumulation of actions by the plaintiff against the respondent. Since the tribunal of the respondent constitutes the general forum of attribution of competence (c. 1408), c. 1493 cannot establish any new forum and, therefore, the objective connection is irrelevant as an innovative criterion for titles of competence. From another point of view, the joinder consists of the plurality of persons in the position of respondent (passive joinder) or plaintiff (active joinder) in a process.[16] The necessary joinder (passive), more than a subjective connection that would involve the multiplicity of actions in the same process (accumulation[17]), above all implies the uniqueness of the process resulting from the only juridical good (determined procedurally by the *petitum* and the *causa petendi*) held by these persons. In causes of nullity of marriage, there is only one necessary respondent: the defender of the bond, because both spouses can be plaintiffs[18]; when the plaintiff is the promoter of justice (c. 1674,2°), there is a necessary passive joinder consisting of the two spouses and the defender of the bond. The voluntary or obligatory intervention of a third party in the cause is different from the joinder and is handled by law as an incidental matter.[19]

15. See the commentary on c. 1415; M. CABREROS DE ANTA, "La prórroga de la competencia judicial…," cit., pp. 341–342.
16. Cf. F. ROBERTI, *De processibus*, cit., no. 194, pp. 537–539.
17. Cf. ibid., no. 235, pp. 644–645.
18. Cf. c. 1674,1°; R. RODRÍGUEZ-OCAÑA, "La legitimación originaria y sucesiva en los procesos de nulidad matrimonial," in *Ius Canonicum* 27 (1987), pp. 187–190; I. ZUANAZZI, "Le parti e l'intervento det terzo," in *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), p. 367.
19. Cf. cc. 1596 and 1598; sentence *coram* HUOT, February 2, 1984, cit., no. 9; Z. GROCHOLEWSKI, "Quisnam est pars conventa in causis nullitatis matrimonii?," in *Periodica* 79 (1990), pp. 357–391; idem, "Parte convenuta nelle cause di nullità di matrimonio," in D.J. ANDRÉS G. (Ed.), *"Vitam impendere magisterio." Scritti in onore dei Proff. R. Pizzorni e G. di Mattia* (Rome 1993), pp. 41–55; L. MADERO, *La intervención de tercero en el proceso canónico* (Pamplona 1982).

8. The concept of concurrence of actions is also related to connection. Concurrence occurs when two or more different actions are intended for the same objective. One writer considers concurrence to be the necessary joinder,[20] although this situation really involves a plurality of actions.

9. Canon 1494 regulates the counteraction: the respondent, in the process initiated by the plaintiff, may lodge an action against the plaintiff, who, with respect to the counteraction, becomes the respondent. The counteraction involves an important procedural disorder: the reversal of the parties' positions in the same process, which was only justified in canonical tradition as a manifestation of the respondent's right to defense. In fact, c. 1690 § 1 of the *CIC*/1917 demanded that the counteraction serve to "neutralize or reduce" the plaintiff's petition. Adopting doctrine's and jurisprudence's indications, c. 1494 also accepts the counteraction by objective connection. This new possibility for the counteraction does not create a new title of competence, because it can lead back to that of c. 1414. From the classical counteraction can arise a new forum of relative competence exclusively when it is lodged before a tribunal that only holds the title for the general forum of the respondent of the original action, and the plaintiff in the action does not possess the domicile or quasi-domicile in that place. In this situation, without the title of the counteraction, the respondent could not sue the plaintiff before that tribunal because it would be non-competent.

10. In the *CIC*, at the suggestion of doctrine,[21] the correlative c. 1567 of the *CIC*/1917 was added, which stated that connected causes must be judged "in the same process ... unless this is prohibited by some provision of the law." This conditional clause includes: the various phenomena of absolute non-competence (material, subjective, and functional: cf. c. 1639 § 1), the limitation of the tribunal with just one judge (c. 1425 §§ 1, 3 and 4), the voiding prohibition on using the oral contentious process for some types of causes,[22] or the documentary process to judge a chapter of nullity of marriage other than those established in c. 1686.

20. Cf. F. ROBERTI, *De processibus*, cit., no. 234, p. 643.

21. Cf. *Comm.* 10 (1978), pp. 226–227; M. CABREROS DE ANTA, *Comentarios al Código de Derecho Canónico*, III (Madrid 1964), p. 234.

22. Cf. cc. 1656, 1690, 1710, 1728 §1, etc.; *Comm.* 10 (1978), pp. 226–227.

1415 Ratione praeventionis, si duo vel plura tribunalia aeque competentia sunt, ei ius est causam cognoscendi, quod prius partem conventam legitime citaverit.

By reason of prevention, if two or more tribunals are equally competent, the tribunal that has first lawfully summoned the respondent has the right to hear the case.

SOURCES: c. 1568; *PrM* 11

CROSS REFERENCES: cc. 1482 § 2, 1507, 1512, 1632 § 2

COMMENTARY

Joaquín Llobell

1. Canon 1407 § 1 does not include prevention among the titles of relative competence, because prevention does not constitute any forum. It is an institution that seeks to resolve *ex lege* conflicts of competence arising between tribunals that possess competence over the same cause prior to the conflict of competence, without the need for a judicial or administrative decision from an independent body. Prevention determines which tribunal can judge the cause. This determination involves a *positive* indication (which one may judge) and another *negative* indication (which one may not), because the principle *ne bis in idem* demands that each cause be judged by one tribunal, at each grade or instance. The indication belongs to the sphere of functional criteria for determining competence; therefore, in the negative sense, it involves derogation of the competence of the tribunal that was competent before the solution of the conflict through prevention. The tribunal losing competence through prevention (in favor of the one that first summoned the respondent) becomes absolutely non-competent; therefore, its judgments are irremediably null (c. 1620,1°).[1]

2. The presupposition of the conflict is the concurrence between more than one tribunal. Therefore, prevention does not apply in major causes (c. 1405) or in the administrative-contentious process (cc. 1400 § 2 and 1445 § 2), because in these processes there is only one competent tribunal. For the same reason, prevention cannot be lodged between a

1. Cf. Signatura, *Declaratio de foro competenti in causa nullitatis matrimonii, post sententiam negativam in prima instantia latam*, June 3, 1989, in *AAS* 81 (1989), pp. 988–990, nos. 2, 3 and 5.

regional tribunal constituted only for matrimonial causes (c. 1423 § 2) and a diocesan tribunal in a penal cause. However, prevention is allowed between more than one local appellate tribunal when, according to the provisions of c. 1439 § 2, more than one appellate inter-diocesan tribunal has been constituted to hear judgments of the first instance in the second instance.

According to the grade of the trial, prevention between two appellate tribunals is impossible if one of them is not the one expressly determined by cc. 1438 and 1439, because to be competent, it is insufficient to be an appellate tribunal in general, it is necessary to be it *ad normam iuris* (c. 1440). Therefore, prevention is not possible between one competent appellate tribunal and another non-competent one. The Roman Rota presents a different problem, in that it is a universal appellate tribunal according to cc. 1443 and 1444 § 1, except for causes reserved to the Roman Pontiff, the CDF, the *CDWDS* and the Signature. Prevention applies between the Rota and all local appellate tribunals if the latter are materially and functionally competent. On the other hand, c. 1632 § 2 accepts the hierarchy between the appellate tribunals, at the vertex of which is the Roman Rota. Therefore, if the conflict arises when one party appeals to the Rota and the other to the local tribunal, before one of the tribunals summons the other party (cf. c. 1640), the trial of second instance belongs to the Rota.[2] The coincidence of a double judicial hierarchy at the appeal allows prevention to apply not only to relative competence, but also to absolute competence, as well as functional competence.

3. Canon 1553 § 2 of the *CIC*/1917 foresaw prevention in causes on matters subject to both the canonical and civil systems. The Code Commission, when examining c. 2 of the 1976 *Schema*, decided to delete the reference to this application of prevention, since they found it non-viable in the current historical context, in which "prevention is only possible between two tribunals of the same juridical system."[3] Nevertheless, the parameters of the issue are not as clearly defined as the Code Commission interpreted them. In fact, c. 1692 § 2 provides that the diocesan bishop may give permission to spouses to submit conjugal separation to the civil tribunal. This permission does not involve the loss of the canonical jurisdiction over this type of cause (cc. 1671, 1692–1696), which "affect the (ecclesiastical) public good" (c. 1696). Therefore, competent canonical tribunals (c. 1694) can receive a petition for conjugal separation without permission from the bishop (c. 1692 § 1), in concurrence with the civil tribunal. In this situation, consistency in interpretation seems to allow prevention, at least against the ecclesiastical tribunal. On the other hand,

2. Cf. Decr. *coram* POMPEDDA, December 14, 1992, in *Ius Ecclesiae* 5 (1993), pp. 597–602; J. LLOBELL, "La necessità della doppia sentenza conforme e l''appello automatico' ex can. 1682 costituiscono un gravame? Sul diritto di appello presso la Rota Romana," in *Ius Ecclesiae* 5 (1993), pp. 602–609.

3. *Comm.* 10 (1978), p. 218.

some state systems recognize the civil value of canonical judgments of nullity of marriage, and establish agreements or concordats for these procedures for their respective execution and recording.[4] Inasmuch as international treaties are binding on the parties that have stipulated to them, then with the entry in a civil registry of a canonical judgment of nullity of the bond and a civil divorce judgment being incompatible, it would be possible to lodge prevention (or the exception of *litis pendentia*) before the civil tribunal that would seek to judge a cause of divorce when a canonical cause of nullity of marriage is pending (not vice versa, because the Church does not recognize any effect for a civil divorce, just as these civil concordat systems do not recognize canonical separations[5]). Setting aside the practical difficulties involved in the inter-system exercise of prevention, it seems evident that, at the level of principle and of legal measures (although canonical and civil law need norms of application), there can be mixed forum causes in which this is possible.[6] The permeable nature of the division between systems with effects on the canonical process has been manifested (e.g., in c. 1675). According to c. 1675, after the death of one or both spouses, the deceased's successors or whoever is a party in a civil process on said succession are qualified to challenge the marriage before an ecclesiastical tribunal, or to renew the instance (cf. c. 1518,1°). Another manifestation of this permeable nature consists of the preclusive effect between systems of the adjudged matter.

4. Prevention grants the right to judge the cause to the competent tribunal that has first lawfully summoned the respondent (c. 1415). In causes in which a public party intervenes, the public status does not affect prevention because of the principle of equality of the parties, regardless of whether they are public or private.[7] In the summons of the respondent, it is necessary to distinguish two moments: when the decree is pronounced by the judge (c. 1507) and when the decree is notified to the respondent (cc. 1509 and 1510). Without considering the problems involved in effective notification, the juridical effects of the summons come from the moment of its notification (c. 1512); this is the determining moment for applying prevention. The acts before this notification are irrelevant.

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4. Cf. *Concordato entre la Santa Sede y la República de Colombia*, July 12, 1975, a. 8, in *AAS* 67 (1975), pp. 421–434; *Acuerdo entre la Santa Sede y el Estado Español sobre asuntos jurídicos*, January 3, 1979, a. 6,2°, in *AAS* 72 (1980), pp. 29–36; *Accordo tra la Santa Sede e la Repubblica Italiana che apporta modifiche al Concordato Lateranense*, a. 8,2° and *Protocollo addizionale*, no. 4, February 18, 1984, in *AAS* 77 (1985), pp. 521–535.

5. Cf. *Concordato entre la Santa Sede y la República de Colombia*..., cit., a. 9.

6. Cf. CORTE DI CASSAZIONE (of Italy), Sezioni unite, sentence, February 13, 1993, no. 1824, §3.5, in *Il diritto di famiglia e delle persone* 22 (1993), pp. 109–127; G. PUCCI, "Appunti in tema di efficacia di giudicato della sentenza ecclesiastica di nullità del matrimonio e di azione ex art. 139 c.c.," in *Il Diritto Ecclesiastico* 2 (1974), pp. 256–274).

7. Cf. Code Commission, "Opera consultorum in apparandis canonum schematibus. 2. De iure processuali recognoscendo," no. 30, in *Comm.* 2 (1970), p. 190; *Schema 1976*, *praenotanda*, no. 55, p. XIV, in *Comm.* 8 (1976), p. 194.

5. Given that prevention comes from the summons and the summons creates *perpetuatio iurisdictionis* and *litis pendentia* (c. 1512,2° and 5°), the exception of prevention is identified with *litis pendentia*, because, in both situations, the tribunal that summoned must possess a lawful title of competence. If the tribunal is non-competent, the applicable exception is non-competence, not *litis pendentia*. *Connection* is a legal title of competence; therefore, the second cause, for which the first tribunal would be non-competent if it were not connected with the first, may be lawfully judged by the latter because, even if c. 1414 seems to establish an obligation for the first tribunal to judge the second cause, it is necessary for the plaintiff to file the petition before it or for the respondent to lodge the exception of connection with a second tribunal before this tribunal pronounces the decree of *litis contestatio*. The procedural handling of the exception of connection is the same as a normal exception of competence, with the particularity that connection does not dispossess the second tribunal of the title invoked by the plaintiff, provided that he or she truly possesses it. In short, the exception of connection is on competence, not non-competence. Even if the party does not lodge the exception, the judge who finds himself competent through the connection must compensate for the negligence of the party and protect, to the extent that it is necessary, the principle *ne bis in idem*: cf. c. 1452 § 2. Therefore, prevention is allowed when the conflict exists regarding the second connected cause, between the first tribunal (which has the forum of connection) and the second (with its respective title of competence).

6. A summons issued by a non-competent tribunal does not create *perpetuatio iurisdictionis* (c. 1512,2°) nor does it make sense to invoke prevention in this situation. When that non-competent tribunal pronounces the decree of *litis contestatio*, because it did not disqualify itself nor did the respondent lodge the respective exception (or it was rejected: c. 1460 §§ 1 and 2), would it be possible to raise prevention between this tribunal and the one holding the title of competence provided by law before the cause was later submitted and proceeded to the summons? The exception of prevention is identified with that of *litis pendentia*, with both presupposing the *perpetuatio iurisdictionis*. In the phenomenon now under consideration, the *perpetuatio iurisdictionis* could not occur with the summons issued by a non-competent tribunal; c. 1459 § 2 prohibits the exception of relative non-competence after the *litis contestatio* ("unless it/they arise/s after [the *litis contestatio*] had taken place"). Canon 1460 § 2 denies the appeal against the exception of non-competence but grants the plaint of nullity and the *restitutio in integrum*... Canon 1457 § 1 establishes sanctions for judges "[who] with no legal support, ... declare themselves competent and hear and determine cases."

In short, the question poses the problem of the expansion of competence and of the persistence of relative non-competence after the *litis contestatio*, even if the judgment is not directly null for this reason. An affirmative answer to this question could be one more means of protecting

the respect of titles of competence, even if it does not satisfy the necessary stability of juridical relationships.[8] Stability would be satisfied by affirming that the canonical system accepts the expansion of competence (which would remedy relative non-competence) and prevention could be lodged by the non-competent tribunal that performed the *litis contestatio* against the competent tribunal that later would have summoned the respondent.[9] The exegesis of these provisions allows an affirmation of the existence of deficiencies and inconsistencies in the current canon law on the regulation of relative competence and institutions directly related thereto. Two facts that the jurist must reconcile clearly emerge: the legislator wishes to protect the full respect of the title of competence in causes of nullity of marriage, and the titles of relative competence do not guarantee that protection, inasmuch as the judgment pronounced by a relatively non-competent tribunal can have the effects of any valid judgment.

The *ius conditum* does not satisfy both facts because the titles of competence in causes of nullity of marriage are relative at the first instance, except for c. 1405 § 1,1°. Therefore, once the inconsistency of the system is individualized, it is only possible to propose solutions *de iure condendo*. There are three possible solutions: accepting that any relatively non-competent tribunal can pronounce valid judgments in causes of nullity of marriage, as the tacit expansion by the parties and the tribunal is accepted; overcoming the dual concept of the nature of absolute and relative competence (as a result expansion would never be possible, except when the competent Roman dicastery grants the "commission of competence"); and defining titles of competence in causes of nullity of marriage as fora of absolute competence because c. 1673 is a specific norm that does not admit the expansion. It does not seem that the solution can be recourse to the Apostolic Signature to resolve this type of conflict of competence (cc. 1416 and 1445 § 1,4°). Nor would a solution come (because it is a dicastery upon which it devolves) through administrative means "to oversee the proper administration of justice" (c. 1445 § 3,1°), because the Signatur can only apply the law, which does not satisfy the protection of the titles of competence in causes of nullity of marriage. Of the three solutions offered, perhaps the one that is most consistent with the system as a whole and canonical tradition is the third.

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8. Regarding the importance of stability, cf. J. LLOBELL, "Il giudicato nelle cause sullo stato delle persone. Note sulla dottrina di Carmelo de Diego-Lora," in *Ius Ecclesiae* 5 (1993), pp. 283–313; idem, "Perfettibilità e sicurezza della norma canonica. Cenni sul valore normativo della giurisprudenza della Rota Romana nelle cause matrimoniali," in PCILT, *"Ius in vita et in missione Ecclesiae." Acta Symposii Internationalis Iuris Canonici, in Civitate Vaticana celebrati diebus 19–24 aprilis 1993* (Vatican City 1994), pp. 1231–1258, §8.

9. In this sense, cf. M.J. ARROBA, *Diritto processuale canonico* (Rome 1993), pp. 115–116.

1416 **Conflictus competentiae inter tribunalia eidem tribunali appellationis subiecta, ab hoc tribunali solvuntur; a Signatura Apostolica, si eidem tribunali appellationis non subsunt.**

A conflict of competence between tribunals subject to the same appeal tribunal is to be resolved by the latter tribunal. If they are not subject to the same appeal tribunal, the conflict is to be settled by the Apostolic Signatura.

SOURCES: c. 1612; *PrM* 10

CROSS REFERENCES: cc. 1438–1440, 1445 § 1,4° § 3,1° et 2°, 1457 § 1

COMMENTARY

Joaquín Llobell

1. The *CIC* establishes sufficient institutions for the same tribunals to decide issues raised regarding their own competence: ex officio disqualification (cc. 1459 § 1 and 1461), exceptions of non-competence ("disqualifying the forum"), *litis pendentia*, prevention, etc. These institutions as a whole, applied (ex officio or at the instance of a party) by the same tribunals involved in the issue of competence, constitute the *ex lege* manner of resolving these incidental matters. Nevertheless, it may be necessary to resort to another organ to authoritatively determine which tribunal is competent in cases of conflict between tribunals. This situation is contemplated in c. 1416.

2. Canon 1612 of the *CIC*/1917, the correlative to c. 1416, was part of the title on the discipline that must be observed in tribunals (cc. 1446-1475 of the *CIC*), the area of the regulation of exceptions, including exceptions of competence. The Code Commission introduced c. 1416 when revising the 1976 *Schema.*[1] Canon 1612 § 2 offered a local solution to conflicts of competence between tribunals not subject to the same appellate tribunal, with the condition that each of them must possess a higher court *in loco*. For this purpose, the appellate tribunal of the tribunal before which the petition was first filed resolved the conflict. In contrast, the Code Commission decided to entrust the solution of all conflicts of competence between tribunals without a common local appellate tribunal to the Apostolic Signature.[2]

1. Cf. *Comm.* 10 (1978), pp. 227 and 249.
2. Cf. ibid., p. 249.

3. Conflicts of competence can be positive or negative (cf. c. 1457 § 1). The conflict is *positive* when two or more tribunals claim competence over the same cause, without being able to resolve it.[3] The issue must be resolved to avoid double judgments on the same dispute (*ne bis in idem*). Moreover, the parties have the right to be judged by the competent tribunal (cc. 221 §§ 1 and 2, 1407 § 1), and protection of the titles of competence is related to the ecclesiastical public good. These two latter reasons also justify the need to resolve *negative* conflicts of competence: the holder of any right to a judgment on the merits of the dispute must be able to turn to the competent tribunal. This tribunal is obligated to judge the cause if the petition meets the requirements (cc. 1504–1505). On the other hand, the competent tribunal is the one determined by law, and in judicial matters, the "colored titles" resulting from common error, which can be applied only to the executive power, are not possible (c. 144 § 1).

4. Canon 1416 guarantees the solution of both types of conflicts of competence (positive and negative). However, the nature of the act of the body resolving the conflict varies, depending on whether it is a positive or negative conflict, although the doctrine of the *CIC*/1917 and part of the more recent doctrine affirms, with varying nuances, that these acts are always administrative.[4] Regarding the solution of negative conflicts, the act by which the competent tribunal is determined does not involve a procedural confrontation between the plaintiff and the tribunal refusing to accept the petition, although the organ that must adopt the solution must hear and assess the reasons why the tribunal is resisting. These reasons can be lawful —e.g., the disqualification of all the judges of a tribunal (cf. cc. 1448, 1717 § 3)— and be referred to the only competent tribunal for that cause; in this situation, it will be necessary for the Signature to grant the appropriate expansion or commission, which devolves upon the third section of the Signature as a ministry of justice of the Church, not as a supreme tribunal.[5] In any case, whether the Signature or the appellate tribunal resolves the negative conflict, the nature of the act is administrative because the presupposition of the process is absent: the dispute between two parties situated in a position of formal equality.

Nevertheless, with respect to the resolution of positive conflicts, there are reasons to maintain the judicial nature of the decision. Canon 1612 § 2 of the *CIC*/1917 granted competence to the legate of the Holy See to decide conflicts between tribunals, at least one of which did not

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3. Cf. Code Commission, *Relatio complectens synthesim animadversionum ab Em.mis atque Exc.mis Patribus Commissionis ad Novissimum Schema Codicis Iuris Canonici exhibitarum, cum responsionibus a Secretaria et Consultoribus datis* (Typis Polyglottis Vaticanis 1981), ad c. 1368, p. 308, in *Comm.* 16 (1984), pp. 53–54.

4. Cf. M.J. ARROBA, *Diritto processuale canonico* (Rome 1993), p. 116; M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, I (Rome 1938), p. 215; F. ROBERTI, *De processibus*, I, 2nd ed. (Rome 1941), no. 150, pp. 437–440.

5. Cf. c. 1445 §3,2°; *PB* 124,2° and 3°. See the introduction to the title.

possess a local higher tribunal. This reference to a not explicitly judicial body (the legate) made it possible for the decision to be considered administrative. However, in current law, the resolution of positive conflicts of competence receives judicial treatment because there is the presupposition of a dispute. In this way, it is separated from the dictates of law, even if law presents ambiguous elements. In fact, the issue is handled in c. 1445 § 1,4°, related to the first section of the Apostolic Signature, the nature of which is that of a "supreme tribunal of ordinary justice."[6] The *SNAS* states that this competence is exercised "by virtue of the proper *administrative* power of the judicial forum" (art. 18,5°). However, articles 68–73, which develop the relative procedure, are in title on "The Judicial Procedure" (articles. 23–85), not in title 5 on "The Administrative Procedure" (arts. 86–95). Article 68 refers back to articles 23 et seq. for acceptance of the petition (cf. cc. 1404 and 1405) while article 69 uses the term *parties* to refer to the opponents. Article 70 provides that the prefect's decision does not allow appeal because it must be adopted *expeditissime* (cf. a. 72; c. 1880,7° *CIC*/1917 and c. 1629,5° *CIC*). In short, there is a notable parallel between the competence of the Apostolic Signature in this procedure and the competence of the Italian Court of Cassation (because it is a supreme tribunal) in the procedure of *regolamento de competenza,*[7] the decision of which is a judgment.[8]

5. "A conflict of competence between tribunals subject to the same appeal tribunal is to be resolved by the latter tribunal" (c. 1416). This norm only refers to local appellate tribunals. It excludes the Roman Rota, which is the universal appellate tribunal (cc. 1443 and 1444 § 1) but not the supreme tribunal of the Church, which office belongs to the Apostolic Signature and upon whom it devolves to resolve conflicts between tribunals that are not subject to the same appellate tribunal (cc. 1416 and 1445 § 1,4°). The common local tribunal must be identified according to the provisions of cc. 1438 and 1439. The Rota of the Apostolic Nunciature in Spain, in the ordinary route, is only the appellate tribunal of the metropolitan tribunals and of those tribunals directly subject to the Holy See.[9] In Italy, the regional tribunals for causes of nullity of marriage possess the appellate tribunals determined in proper law.[10] Recourses may be lodged directly before the tribunal that is competent to decide the conflict or, similar to the appeal (c. 1630 § 1), before one of the tribunals the competency of

6. Cf. *PB* 122,4°; Z. GROCHOLEWSKI, "I tribunali," in P.A. BONNET-C. GULLO (Eds.), *La Curia Romana nella cost. ap. Pastor bonus* (Vatican City 1990), pp. 403–414.
7. *Codice di procedura civile,* arts. 47–50.
8. Cf. ibid., a. 49.
9. Cf. JOHN PAUL II, M.P. *Nuntiaturae Apostolicae in Hispania,* 2.X.1999, in *AAS* 92 (2000), pp. 5-17, art. 37 § 1.
10. Cf. Pius XI, MP *Qua cura,* December 8, 1938, in *AAS* 30 (1938), pp. 410–413, a. 2; JOHN PAUL II, MP *Sollicita cura,* December 26, 1987, a), in *AAS* 80 (1988), pp. 121–124; GULLO, "Note minime in tema di 'prorogatio competentiae ratione continentiae'," in *Il Diritto Ecclesiastico* 95/2 (1984), pp. 248–254.

which is discussed in order that it be elevated to be the competent body. Positive conflicts of competence are judicially handled according to the norms of incidental causes, in which the oral contentious process is allowed (c. 1590). When the conflict is the result of rejection of the exception of non-competence, the recourse covers the functions of the appeal of the decision, even if this appeal is prohibited by c. 1460 § 2 for relative non-competence. Lega believed that the recourse presented before one of the tribunals in conflict only had a *returnable*effect (sending the recourse and the relevant acts to the higher tribunal), not a *suspensive* effect, although it recommended that the lower tribunal suspend its activity until the conflict was resolved.[11] It devolves upon the power of the higher tribunal to decree suspension, provided that it finds it appropriate (which will be what is normal[12]), inasmuch as the conflict can involve nullity of the procedural acts (by analogy with the provision of c. 1451 § 2) as well as of the judgment of the non-competent tribunal by *litis pendentia*.

11. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, I, cit., p. 214.
12. Cf. F. ROBERTI, *De processibus*, cit., no. 150, p. 440.

TITULUS II
De variis tribunalium gradibus et speciebus

TITLE II
Different Grades and Kinds of Tribunals

INTRODUCTION

Zenon Grocholewski

1. This title indicates what the tribunals in the Church are, who is responsible for each of them, and what persons compose each.

2. *Tribunal*

The word *tribunal* is in this title used to designate the judge (with or without the other ministers who make up the tribunal), not the place of the trial (regarding the place of the trial, see cc. 1468–1469). In the formulation of the title, specific reference is made to the *grades* and *types* of tribunals.

3. *Grade of the tribunal*

The *grade* is the position the tribunal occupies in the hierarchical order of the tribunals. The *grade* also refers commonly to the level of trial; however, a given grade of tribunal does not necessarily have the same grade of trial. Moreover, the word *grade* is used interchangeably with the term *instance*—tribunal of first instance, of second instance, etc. As a synonym of *grade,* the term *instance* seems to highlight the course of the procedure at a given grade (cf. cc. 1517–1525).

With respect to the grades of the tribunals, the Supreme Tribunal of the Apostolic Signatura—upon which it devolves to oversee the proper administration of justice in the Church (*PB* 124,1°)—insists that the distinction between hierarchically subordinated tribunals be fully respected. As

a result, the Signatura always intervenes when it is discovered that someone is working in two tribunals, one of which is hierarchically superior to the other.[1]

4. *Types of tribunals*

Tribunals are also distinguished by *type*, which refers to the characteristics of the tribunal and its competence. In the canons of this title, the following types of tribunals can be found:

— in relation to the hierarchical structure of the Church: tribunals of the Holy See, (*apostolic* tribunals, cc. 1442–1445; cf. also c. 1402) and tribunals of the local Churches (*local* or *ordinary* tribunals—cc. 1419–1441, *passim*); together with these latter tribunals, in a certain sense, because they do not belong to the hierarchical structure of the Church (cf. c. 207 § 2), *religious* tribunals (cc. 1427 §§ 1–2, 1438,3°). *Pastor bonus* 124,3° (see commentary on c. 1445: no. 6) calls the local church tribunals *lower* tribunals, while c. 1632 § 2 considers the apostolic tribunals as *superioris gradus*[2];

— in the sphere of the local Churches, taking into account mainly the territory: *diocesan* tribunals (c. 1420 and *passim*), *metropolitan* tribunals (c. 1438,1°–2°) and *interdiocesan* tribunals (cc. 1423, 1439);

— with regard to causes: tribunals *for all types of causes* and tribunals *for a given type of cause*—for example, only for matrimonial causes—(c. 1423 § 2). Taking this distinction into account, one speaks of *general* and *special* tribunals;

— with regard to the identity of the parties: *privileged* tribunal, to which are reserved the causes, or a type of causes, of certain persons of particular importance (c. 1444 § 2) and *common* tribunal, for all other persons;

— with respect to the *sole-judge* tribunal and *collegiate* tribunal (cc. 1424 and 1425 §§ 1, 2 and 4);

— with respect to the nature of the disputes: *ordinary* tribunals, for contentious matters between private parties and for penal disputes (cf. all the cc., except c. 1445 § 2), and *administrative* tribunals, for all disputes arising from a sole administrative act of the ecclesiastical authority (c. 1445 § 2);

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1. Cf. F. DANEELS, "De tutela iurium subiectivorum: quaestiones quaedam quoad administrationem iustitiae in Ecclesia," in *Ius in vita et in missione Ecclesiae. Acta Symposii Internationalis Iuris Canonici* (Vatican City 1994), pp. 175–184.

2. Cf. Z. GROCHOLEWSKI, "L'appello nelle cause di nullità matrimoniale," in *Forum* 4 (1993), II, pp. 37–38.

— in connection with the jurisdiction (cf. c. 131 § 1): *ordinary* tribunals judge with ordinary power and *delegate* tribunals judge with delegated power (cf. cc. 1418 and 1427 § 2). In this regard, c. 135 § 3, should be borne in mind, according to which "judicial power, which is possessed by judges and judicial colleges ... cannot be delegated except for the performance of acts preparatory to some decree or judgment," which norm is reflected in this title in c. 1418. In any event, the Holy Father can establish a delegate tribunal to issue a decision (see commentary on c. 1442), and the diocesan bishop may also do so in his own diocese (see commentary on c. 1419: no. 4), as well as the supreme moderator of a clerical religious institute of pontifical right or a society of clerical apostolic life of pontifical right (see commentary on c. 1427: no. 2);

— according to the territorial or personal delimitation of the community referred to: *territorial* tribunals, competent for a given territory (all the canons, except cc. 1427 §§ 1–2 and 1438,3°), and *personal* tribunals, competent for a given category of persons (cc. 1427 §§ 1–2 and 1438,3°, also, in a certain regard, 1444 § 2; the military ordinariates are also this type of tribunal: see commentary on c. 1420: no. 2, a). There can also be *mixed* tribunals, which refer to territorial as well as personal circumscriptions (interdiocesan tribunals that also refer to some personal circumscription, for example, the military Ordinariate, or diocesan tribunal competent by law also for the military ordinariate: see commentary on c. 1429: no. 2, a).

This title does not mention one division of ecclesiastical tribunals, namely the distinction between tribunals instituted according to the norms of the universal law of the Church and tribunals instituted according to the norms of a particular law or of a pontifical indult. Among these latter tribunals, there are the Rota of the Apostolic Nunciature in Madrid,[3] the tribunal of the Primate of Hungary,[4] the tribunal of Freiburg of Breisgau, which by virtue of a concession of April 23, 1910 granted without time limitation by Pius X, can judge at the third instance causes of the archdiocese of Cologne,[5] and the tribunals of Vilnius and of Kaunas in Lithuania, which, by a concession obtained from the Apostolic Signatura, are authorized to judge causes of other dioceses even at third instance.[6] A denial of the expansion and the declaration of cessation of similar privileges existing in some dioceses (especially in Germany[7] and in Poland[8]), on the part of the Holy See in recent years shows the tendency to eliminate those exceptions when they are not postulated by exceptional demands.

3. M.P. *Nuntiaturae Apostolicae in Hispania*, 2.X.1999: *AAS* 92 (2000), pp. 5-17.
4. Cf. P. ERDŐ, "Il potere giudiziario del Primate d'Ungheria," in *Apollinaris* 53 (1980), pp. 272–292; and, in the *Apostolic Signatura*, prot. no. 11.470/79 CP.
5. Cf., in the *Signatura Apostólica*, prot. no. 1508/61 CP.
6. Signatura, Decr. May 2, 1980, prot. no. 12.247/80 VT.
7. In the *Signatura Apostólica*, prot. nos. 4727/73 CP, 4140/84 SAT.
8. In the *Signatura Apostólica*, prot. nos. 23.711/92 VT, 4593/93 SAT.

This title also does not allude to the Apostolic Penitentiary, which in *Pastor bonus*, the *Annuario Pontificio* and the volumes on *l'Attività della Santa Sede*, is listed among the tribunals of the Holy See, because it is not a tribunal in the proper sense.[9]

5. *Division of the matter*

After the introductory canons on the right to directly approach the Holy See and the collaboration between the tribunals (cc. 1417–1418), the first chapter discusses the tribunal of first instance (cc. 1419–1437), its structure and its personnel. The second chapter refers to the tribunal of second instance (cc. 1438–1441), and the third chapter discusses the tribunals of the Apostolic See (cc. 1442–1445).

This division is not entirely adequate, mainly because a given tribunal may not necessarily have just one grade of trial. For example, a diocesan tribunal of the first grade can be designated as an appellate forum of a metropolitan tribunal or of a diocese immediately subject to the Holy See (c. 1438,2°). The metropolitan tribunal judges some causes at the first instance (c. 1419 § 1), and others at the second instance (c. 1438,1°); an interdiocesan tribunal can also have that competence (see commentary on c. 1432). Every appellate tribunal can receive competence to judge a cause at the first grade by virtue of c. 1419 § 2 or c. 1683. The Roman Rota can judge some causes at the first instance, all causes at the second instance and, at the third or last instance, it is the only competent tribunal by universal law (*PB* 128–129; see commentary on cc. 1443–1444). Therefore, the division of the chapters reflects the grades of trial more than the grades of the tribunals.[10]

6. *Abrogated canons*

With respect to the third chapter, it is necessary to remark that the subject has been fully reordered by the Ap. Const. *Pastor Bonus*, arts. 121–130. Therefore, pursuant to c. 20, this chapter—except c. 1442, which discusses the Roman Pontiff—must be considered abrogated and the articles of *Pastor bonus* should be discussed in its place.

9. Cf. Z. GROCHOLEWSKI, "I tribunali apostolici," in *Le nouveau Code de Droit Canonique-The New Code of Canon Law. Actes du V Congrès International de Droit Canonique-Proceedings of the 5th International Congress of Canon Law* (Ottawa 1986), vol. I, pp. 457–458; idem, "I tribunali," in *La Curia Romana nella Cost. Ap. "Pastor Bonus"* (Vatican City 1990), pp. 396–399.

10. Cf. K. LÜDICKE, in *Münsterischer Kommentar zum Codex Iuris Canonici* (Essen 1985) (Loseblattwerk), *Stand:* 22. Erg.-Lfg. Nov. 1993, Einführung vor 1417,6.

7. *In addition to ordinary judgment*

It should also be noted that, while all other canons in this title refer to contentious and penal causes, c. 1445 on the Supreme Tribunal of the Apostolic Signatura discusses in its §§ 2 and 3 other things: § 2 (corresponding to *PB* 123) concerns the Supreme Tribunal of administrative justice, which is the only administrative tribunal in existence in the Church; § 3 (corresponding to *PB* 124), discusses the Apostolic Signatura as an organ with administrative power related to the administration of justice in the Church.

8. *Key canons*

This title must attribute crucial importance to cc. 1410 § 1 and 1442, in that they contemplate divine law and constitute the point of reference for the entire title. According to divine law, strictly speaking, judges are the diocesan bishops in their particular Church and the Pope at the level of the universal Church.

9. *The substantives "diocesan bishop" and "diocese"*

When reading the canons of this title, it should be borne in mind that in them the expression "diocesan bishop" or "bishop" refers to the diocesan bishop and to all those who are equivalent in law to him (cf. c. 381 § 2), even if they have not received episcopal ordination: those who are at the head of territorial prelatures, territorial abbeys, apostolic vicariates, apostolic prefectures, permanently established apostolic administrations (cf. c. 381 § 2 together with c. 368 and cc. 369–371) and military ordinariates[11] (see commentary on c. 1420: no. 2, a). This commentary will only refer to diocesan bishops when commenting on the canons of this title, with the understanding that this encompasses all persons equivalent to them.

All the provisions of this title related to the diocesan bishop also refer (with some limitations: see commentary on c. 1420: nos. 2, c and 11) to heads of missions *sui iuris* (enumerated in the *Annuario Pontificio* after the apostolic administrations) and diocesan administrator and their equivalents (discussed in cc. 421 et seq.), although they are not equivalent in law to the diocesan bishop.

Similarly, the noun *diocese* in this title refers not only to the diocese but also to communities of the faithful similar to it, as well as missions *sui iuris*.

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11. Cf. SMC, I §1 and II §1.

1417 **§ 1. Ob primatum Romani Pontificis integrum est cuilibet fideli causam suam sive contentiosam sive poenalem, in quovis iudicii gradu et in quovis litis statu, cognoscendam ad Sanctam Sedem deferre vel apud eandem introducere.**

§ 2. Provocatio tamen ad Sedem Apostolicam interposita non suspendit, praeter casum appellationis, exercitium iurisdictionis in iudice qui causam iam cognoscere coepit; quique idcirco poterit iudicium prosequi usque ad definitivam sententiam, nisi Sedes Apostolica iudici significaverit se causam advocasse.

§ 1. Because of the primacy of the Roman Pontiff, any of the faithful may either refer their case to, or introduce it before, the Holy See, whether the case is contentious or penal. They may do so at any grade of trial or at any stage of the suit.

§ 2. Apart from the case of an appeal, a referral to the Apostolic See does not suspend the exercise of jurisdiction of a judge who has already begun to hear a case. The Judge can, therefore, continue with the trial up to the definitive judgement, unless the Apostolic See has indicated to him that it has reserved the case to itself.

SOURCES: § 1: c. 1559 § 1
§ 2: c. 1559 § 2; Signatura Litt. circ., 13 dec. 1977

CROSS REFERENCES: cc. 331, 361, 1405 § 1,4°, 1444 § 2, 1445 § 2

COMMENTARY

Zenon Grocholewski

1. *What is the right of the faithful being treated here?* (§ 1)[1]

The first section of c. 1417 is essentially a reproduction of c. 1569 § 1 of the *CIC*/1917. Therefore, to correctly comment on this canon, canonical tradition must be taken into account (cf. c. 6 § 2).

1. Z. GROCHOLEWSKI, "Diritto dei fedeli di deferire le cause presso la Santa Sede," in *I diritti fondamentali del cristiano nella Chiesa e nella Società. Atti del IV Congresso Internazionale di Diritto Canonico* (Fribourg Suisse-Freiburg i. Br.-Milan 1981), pp. 559–567.

The wording of § 1 implies that, because of the primacy of the Roman Pontiff, every one of the faithful has the right to request a trial before the Holy See on the merits of the cause, either from the start or at any point in the process. The phrase *integrum est* cannot mean anything but "having the right" (cf. the meaning of this expression in cc. 80 § 3, 212 § 2, 215, 240 § 1, 299 § 1, 497,1°, 901, 991, 1031 § 3, 1083 § 2, 1261 § 1, 1505 § 4). The verb *deferre*, when it refers to a cause, usually means "to introduce" (cf. cc. 1400 § 2, 1444 § 1,1°, 1445 § 2, 1692 § 3, 1152 § 3), and *introducere* a cause cannot have any other meaning than what is established by book VII, part II, section I, title I. Therefore, the words *integrum est cuilibet fideli causam suam … cognoscendam ad Sanctam Sedem deferre vel apud eandem introducere* seem to affirm this right of the faithful.

Nevertheless, that interpretation is unacceptable for several reasons. What follows from the primacy of the Roman Pontiff is not this right of the faithful, but the right of the Roman Pontiff to take over any cause, from its initiation or at any stage of the process (see c. 331). Moreover, this right of the faithful is not stated in the sources of c. 1569 § 1 of the *CIC*/1917, and the Holy See did not recognize this right while the *CIC*/1917 was in force, nor does it recognize it now. In fact, recognition of this right would involve grave practical consequences with respect to proper judicial economy postulated by the correct application of the principle of the subsidiary nature of that area.

Although some authors interpreted c. 1569 § 1 of the *CIC*/1917 as articulating this right of the faithful (Blat, Lega-Bartoccetti), most correctly interpreted the canon as declaring the right of the Roman Pontiff to take over any cause within the competence of the Church, with the resulting faculty of the faithful to ask for the case transfer (Wernz-Vidal, Capello, Roberti, Cabreros de Anta, Gordon, Mörsdorf, Tocanel, Pieronek, Della Rocca). In addition, c. 1405 § 1,4° agrees with the interpretation of these writers mentioned.

Moreover, paragraph 2 of this same c. 1569 of the *CIC* 7 provides that, in this case, the jurisdiction of the judge who has begun to judge the cause is not suspended. But, if the interpretation implied by the words of § 1 were true, in the case of that *delatio* or *introductio*, the jurisdiction of the lower judge must be automatically suspended.

In conclusion, it should be noted that the right of the faithful set forth in this canon is the right to ask the Holy See to take over the cause, which may be granted or denied. Moreover, the case transfer granted may also be revoked (cf., e.g., Capello, Roberti, Gordon, and Tocanel). Obviously, the transfer of jurisdiction over the cause to the Holy See is granted only for grave and exceptional reasons.

Owing to the reference made to the primacy of the Roman Pontiff, which is a personal prerogative, it is a matter of a request for transfer directed to the Pontiff himself. But the transfer requested may involve the

commission of the cause to an ordinary tribunal of the Apostolic See (cf. c. 1442). In any case, the Holy Father has entrusted by law the examination of some of these requests to the Apostolic Signature (*PB* 124,2°; see commentary on c. 1445: no. 6), and in the form of a special faculty, to the Dean of the Roman Rota.[2]

2. *Effect of the provocatio to the Apostolic See* (§ 2)

In § 2, the request for case transfer is designated with the generic term *provocatio*[3]—which may mean any instance or challenge—precisely to not identify the request with a specific form of challenge.

Paragraph 2 provides that that *provocatio* directed to the Apostolic See does not suspend the jurisdiction for the judge who has begun to judge the cause. Therefore, this judge may proceed with the trial until the definitive judgment. This provision has considerable practical importance. It advises against lodging these petitions with the Holy Father only to hold up the *iter* of the process. Although the same norm was in force in the *CIC*/1917 (c. 1569 § 2), the Signature found it necessary to mention it in the circular of December 13, 1977.[4] In the light of that circular, this paragraph under discussion should be interpreted in the sense that the *provocatio* to the Apostolic See not only does not suspend the jurisdiction of the judge who has begun to handle the cause, but it also does not suspend execution of the decision that was already pronounced.

The phrase *praeter casum appellationis* is incomprehensible because it is not understood how there could be an appeal to the Holy See against a decision if a local tribunal has already acquired jurisdiction to hear that appeal. It does not seem that the canon is trying to state that, in the event that the lower judge has begun to hear the cause under appeal, the petition for transfer to the Holy See suspends the jurisdiction of that lower judge. Rather, it seems that the phrase, referring to an appeal to the Roman Rota, is out of place. In fact, this canon does not seem to consider ordinary challenges but only requests directed to the Holy Father in order that a cause may be handled by the Holy See outside of the cases established by law. As for the rest, the Roman Rota is an appellate tribunal (*PB* 128,1°; see commentary on cc. 1443–1444: no. 3; cf. also c. 1632 § 2) for any cause that is not reserved for the Roman Pontiff by law (cf. c. 1405 § 2). Moreover, it should be noted that not only an appeal but also a petition for *restitutio in integrum* directed to the Holy See suspends execution of the judgment (c. 1467 § 1).

2. Cf. *AAS* 74 (1982), p. 516, no. 4.
3. Cf. *Comm.* 10 (1978), p. 228.
4. *AAS* 70 (1978), p. 75.

However, once the judge who began to handle the cause is told that the Apostolic See has taken it over, the judge's jurisdiction ceases. Similarly, in the event that the judge is so informed, the decision adopted cannot be executed, and the judge becomes non-competent to examine any challenges against the decision already made by the ordinary judge who would otherwise be competent to do so. Once the cause is taken over, the non-competence of the other judges is absolute (c. 1405 § 1,4° in connection with c. 1406 § 2); thus his eventual judgment on the issue would be irremediably null (c. 1620,1°).

1418 Quodlibet tribunal ius habet in auxilium vocandi aliud tribunal ad causam instruendam vel ad actus intimandos.

Every tribunal has the right to call on other tribunals for assistance in instructing a case or in communicating acts.

SOURCES: c. 1570 § 2

CROSS REFERENCES: cc. 135 § 3, 1428 § 3, 1469 § 2

COMMENTARY

Zenon Grocholewski

1. *Exegesis of the text*

The canon refers to the due collaboration between ecclesiastical tribunals for the purpose of the effective administration of justice. In any event, this is not merely a courtesy, but an actual right to ask for assistance, which corresponds to an obligation to render it.

It is a matter of assistance in instructing the cause, with respect to the questioning of the parties, witnesses and experts, the examination of some expert report, the inspection of some location or some thing (cf. cc. 1530–1583), and in notifying of the acts (summonses, reports, decrees, judicial acts, judgments). Although it is not expressly stated (as it was in c. 1570 § 2 *CIC*/1917), the tribunal from which assistance is being requested must observe the norms related to the various types of acts that must be performed.

The tribunal rendering this assistance only has the decision-making power set forth in c. 1428 § 3. No tribunal may confer upon another the power to decide any dispute through a decree or judgment (cf. c. 135 § 3).

2. The possibility given to the judge to move outside his own territory to collect proof (c. 1469 § 2) does not eliminate the importance of this canon. In fact, for a judge to travel involves quite a few inconveniences, requires time, and is costly. Therefore, in general, it is neither appropriate nor advisable. That is why the legislator has linked it to certain conditions. The instruction that must take place outside of the territory of the jurisdiction of the tribunal must be carried out, in general, by making use of the assistance of the tribunal of the place where the evidence or statements must be gathered.

3. The Apostolic Signature has often urged tribunals to make use of assistance, instead of calling to themselves the parties or witnesses residing within the jurisdiction of another tribunal.[1]

Often the decrees of the Apostolic Signature, among the reasons for a denial of the commission of a cause to a tribunal other than the one that is competent by law (see commentary on c. 1445: no.6), also indicate the possibility discussed in this canon.[2] At times, when granting or denying this commission, the Signature expressly decrees that the parties be given the opportunity to testify, to consult the acts when they are published and to perform other acts included in the right to defense at a see that is not too far away, unless the party waives the right to defense.[3]

With respect to cooperation among tribunals, it should be indicated that at times the Apostolic Signature, responsible for overseeing the proper administration of justice (see commentary on c. 1445: no. 6), invites the tribunal of the plaintiff to appoint an expert in canon law who may assist the tribunal in presenting the cause before the competent forum.[4]

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1. *Decree* December 16, 1993, prot. no. 23.998/93 VT. Cf. a similar case: *Letters*, November 30, 91 and January 3, 92, prot. no. 23.112/91 VT.

2. Among the most recent decrees, cf. prot. nos. 21.277/89 CP, 21.898/90 CP, 22.044/90 CP, 22.491/92 CP, 22.505/91 CP, 23.363/92 CP, 23.510/92 CP, 23.816/92 CP, 23.916/92 CP, 24.114/93 CP, 24.538/93 CP, 24.607/93 CP, 24.637/93 CP.

3. Cf., e.g., prot. nos. 23.816/92 CP, 23.916/92 CP, 24.257/93 CP, 24.299/93 CP, 24.307/93 CP, 24.504/93 CP, 24.557/93 CP, 24.690/93 CP, 24.782/93 CP, 24.914/94 CP, 24.929/94 CP, 24.949/94 CP.

4. Cf., e.g., prot. nos. 21.277/89 CP, 22.140/90 CP, 23.510/92 CP.

CAPUT I
De tribunali primae instantiae

ART. 1
De iudice

CHAPTER I
The Tribunal of First Instance

ART. 1
The Judge

1419 **§ 1. In unaquaque dioecesi et pro omnibus causis iure expresse non exceptis, iudex primae instantiae est Episcopus dioecesanus, qui iudicialem potestatem exercere potest per se ipse vel per alios, secundum canones qui sequuntur.**

§ 2. Si vero agatur de iuribus aut bonis temporalibus personae iuridicae ab Episcopo repraesentatae, iudicat in primo gradu tribunal appellationis.

§ 1. In each diocese and for all cases that are not expressly excepted in law, the judge of first instance is the diocesan Bishop. He can exercise his judicial power either personally or through others, in accordance with the following canons.

§ 2. If the case concerns the rights or temporal goods of a juridical person represented by the Bishop, the appeal tribunal is to judge in first instance.

SOURCES: § 1: c. 1572 § 1; *LG* 27; Signatura Litt., 24 iul. 1972, n. 1
§ 2: c. 1572 § 2; CI Resp. III, 29 apr. 1940

CROSS REFERENCES: cc. 113–123, 135 §§ 1 et 3, 221, 375–376, 381, 391 § 2, 393, 470, 1405, 1417, 1420–1423, 1425 §§ 2–4, 1428 §§ 1–2, 1435, 1436 § 2, 1446 § 1, 1449 §§ 2–3, 1457 § 1 (en rel. con. 1341 et 1717ff), 1469, 1480, 1483, 1488, 1649 § 1, 1653 § 1, 1717 § 1, 1718, 1721 § 1, 1722, 1724 § 1

COMMENTARY

Zenon Grocholewski

1. *Right and duty of the diocesan bishop*

Jesus Christ as "judge of the living and the dead" (Acts 10:42) granted the Apostles and their successors the power to judge.[1] For this reason the Second Vatican Council, in accord with Holy Scripture and Tradition, reaffirmed that, by virtue of the power conferred upon bishops in their episcopal ordination (cf. *LG* 21–27), they have "a sacred right and a duty before the Lord ... of passing judgment on their subjects" (*LG* 27). Similarly, the Code states that bishops have both a *right* and a *duty* to judge. This is part of the *munus regendi* of the bishop, which is what sets him apart in the legislative, executive, and judicial spheres (c. 135 § 1). The power the bishop receives in his episcopal ordination (cf. c. 375) includes this *munus*, along with the *munera sanctificandi* and *docendi*.

The canon states that "in each diocese ... the judge of first instance is the diocesan bishop". The diocesan bishop is judge by virtue of divine law. He is the native judge (*iudex natus*) in his own diocese. For that reason he must never neglect his responsibility to oversee the proper administration of justice in his diocese.

2. While this canon refers to the diocesan bishop and to those equivalent to him in law; i. e., dioceses and similar circumscriptions (see introduction to this title: no. 9), for the sake of simplicity, this commentary will refer only to the diocesan bishop. Nonetheless, it is to be understood that this reference also includes those who are equivalent in law to the bishop.

3. *Excluded cases*

The assertion that the diocesan bishop is judge in his own diocese "for all cases which are not expressly excepted in law" is a reflection of c. 381 § 1, where the powers of the diocesan bishop are set forth in general terms. Canon law expressly excludes cases that have been reserved to the Roman Pontiff and the Roman Rota (c. 1405), as well as cases indicated by § 2 (see below, no. 7). In light of c. 381 § 1 and the canons on the reservation of cases (cc. 1417 and 1405 § 1,4°, along with c. 1406 § 2), the diocesan bishop is not competent to judge cases excluded by the law and cases the Holy See reserves to itself.

1. Cf. I. GORDON, *De iudiciis in genere*, I (Rome 1976), pp. 4–7.

4. *"Personally or through others"*

The diocesan bishop, in his particular church, may exercise his right and duty to judge "either personally or through others". *Others* is a reference to the diocesan tribunal (cc. 1420–1421), a tribunal that has been established with other diocesan bishops (c. 1423), or judges whom the bishop has delegated to investigate a case within his diocese. (Although some authors think differently,[2] c. 135 § 3, when speaking of the impossibility of delegating judicial authority, does not refer to the person of the diocesan bishop[3]). An analogous situation would be when the Roman Pontiff in the universal Church "gives judgment either personally, or through the ordinary tribunals of the Apostolic See, or through judges whom he delegates" (c. 1442).

5. *Acts reserved to the diocesan bishop*

Although the diocesan bishop exercises judicial power by means of his tribunal, certain actions are reserved to him personally:

1. appointing the judicial vicar (c. 1420 § 1), associate judicial vicars (c. 1420 § 3), other diocesan judges (c. 1421 § 1), the promoter of justice and defender of the bond (c. 1435), and other members of the tribunal (c. 470), as well as removing these persons (see commentary on cc. 1422 and 1436 § 2);

2. punishing judges according to c. 1457 § 1 (cf. cc. 1341 and 1717ff);

3. confirming judicial vicars and adjunct judicial vicars in their offices after taking possession of a diocese (c. 1420 § 5);

4. approving advocates who wish to practice in his territory (c. 1483) or removing them from the register of advocates (c. 1488);

5. approving persons who may serve as auditors (c. 1428 §§ 1–2);

6. reserving some cases to himself (c. 1420 § 2);

7. referring difficult cases or those of greater importance to a larger number of judges (c. 1425 § 2);

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2. E.g., J.I. ARRIETA, commentary on c. 135, in *Pamplona Com*; P.V. PINTO, in *Commento al Codice di Diritto Canonico* (Rome 1985), p. 82; H. PREE, in *Handbuch des katholischen Kirchenrechts* (Regensburg 1983), p. 136; K. LÜDICKE, in *Münsterischer Kommentar zum Codex Iuris Canonici* (Essen seit 1985) (Loseblattwerk), Stand: 22. November 1993, Einführung vor 1419, 3 and 11; 1419, 7; 1442, 5.

3. Cf. F.J. URRUTIA, *De normis generalibus* (Rome 1983), p. 93; M.J. ARROBA CONDE, *Diritto processuale canonico* (Rome 1993), p. 121; P.A.BONNET, "I tribunali nella loro diversità di grado e di specie," in *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), p. 187.

8. assigning cases to judges without following the pre-arranged rotation (c. 1425 § 3);

9. if the bishops' conference allows it, entrusting cases normally reserved to a college of judges to a sole judge (c. 1425 § 4);

10. deciding the issue of recusal made of the judicial vicar (c. 1449 § 2);

11. allowing judges from other dioceses to collect evidence in the territory under his jurisdiction (c. 1469 § 2);

12. being informed that a judge, who previously was either forcibly expelled from his circumscription or prevented from exercising jurisdiction, is about to judge a case in the territory (c. 1469 § 1);

13. establishing rules for fees charged by his tribunals (c. 1649 § 1);

14. unless a particular law provides otherwise, executing the judgment personally or through another (c. 1653 § 1);

15. in penal processes, performing, either personally or through some suitable person, preliminary investigations (c. 1717 § 1); deciding how cases are to proceed (c. 1718); entrusting presentations of petitions of accusation to the promoter of justice (c. 1721 § 1); taking necessary precautions during penal processes (c. 1722); and ordering or forbidding the promoter of justice to renounce an instance (c. 1724 § 1).

It should be pointed out that these acts are not judicial acts in the strict sense of the word, but administrative actions regarding the judicial forum. Moreover, the responsibility of the diocesan bishop to his tribunal does not cease with these acts. It is, instead, of a general character: he is to direct the tribunal (*tribunal moderari*: c. 1649 § 1; *tribunali praeesse*: cc. 1449 § 2, 1488 § 1). In other words, the diocesan bishop is responsible for the right administration of justice in his diocese (preparing personnel, insuring that the tribunal observes the law, etc.). The Apostolic Signatura, which has been entrusted with the administration of justice in the Church (*PB* 124,1°), consistently refers to the diocesan bishop as the moderator and frequently addresses bishops directly about the specific problems of tribunals.

Only the diocesan bishop has the power to agree with other diocesan bishops to form an interdiocesan tribunal (c. 1423 § 1).

Equally, it especially pertains to the bishop to strive earnestly, with due regard for justice, to ensure that lawsuits among the people of God be avoided as far as possible and, if they do occur, be settled promptly and without rancor (c. 1446 § 1).

Book VII also reserves diverse competencies to the diocesan bishop relative to administrative controversies or to conflicts that need to be resolved by means of administrative procedure (cf. cc. 1681, 1692 §§ 1–2, 1699, 1700 § 1, 1701 § 2, 1704–1707, 1720, 1733 § 2, 1734 § 3, 1737–1739, 1740–1752 *passim*).

6. *According to the dispositions of the law*

The judicial power should be exercised in accordance with the law in an arbitrary fashion. Paragraph 1 obviously refers to the procedural law, but other law must also be taken into consideration; namely, the substantial law regarding judgment concerning the object of controversies and the jurisprudence of the tribunals of the Apostolic See (see c. 19 and commentary on cc. 1443–1444: no. 1).

7. *In some cases, however, the appeal tribunal is to judge in the first instance (§ 2).*

Since the diocesan tribunal is the tribunal of the diocesan bishop (see commentary on c. 1420: no. 3), and since juridical persons stand before the court through their lawful representatives (c. 1480), § 2 establishes that, when litigation refers to the rights or temporal goods of a juridical person (cf. cc. 113–123) represented by the bishop (cf. c. 118), the appeal tribunal will judge in first instance, whether the bishop is the plaintiff or the respondent.[4] It is reserved to the Roman Rota (c. 1405 § 3,3°) to judge a diocese (as a respondent[5]), which in all juridical transactions is represented by the diocesan bishop (c. 393).

When a bishop himself is involved as a respondent, contentious cases are reserved to the Roman Rota (c. 1405 § 3,1°) and penal cases are reserved to the Roman Pontiff (c. 1405 § 1, 2°). When a cardinal is involved as a respondent, all cases are reserved to the Roman Pontiff (c. 1405 § 1, 3°).

4. Cf. CPI, Resp. April 29, 1940, in *AAS* 23 (1940), p. 212.

5. Cf. F. ROBERTI, *De processibus*, I, 4th ed. (Vatican City 1956), p. 157, no. 71; I. GORDON, *De iudiciis in genere*, I, 2nd ed. (Rome 1979), p. 123, no. 175.

1420 **§ 1. Quilibet Episcopus dioecesanus tenetur Vicarium iudicialem seu Officialem constituere cum potestate ordinaria iudicandi, a Vicario generali distinctum, nisi parvitas dioecesis aut paucitas causarum aliud suadeat.**

§ 2. Vicarius iudicialis unum constituit tribunal cum Episcopo, sed nequit iudicare causas quas Episcopus sibi reservat.

§ 3. Vicario iudiciali dari possunt adiutores, quibus nomen est Vicariorum iudicialium adiunctorum seu Vice-officialium.

§ 4. Tum Vicarius iudicialis tum Vicarii iudiciales adiuncti esse debent sacerdotes, integrae famae, in iure canonico doctores vel saltem licentiati, annos nati non minus triginta.

§ 5. Ipsi, sede vacante, a munere non cessant nec ab Administratore dioecesano amoveri possunt; adveniente autem novo Episcopo, indigent confirmatione.

§ 1. Each diocesan Bishop is obliged to appoint a judicial Vicar, or 'Officialis', with ordinary power to judge. The judicial Vicar is to be a person distinct from the Vicar general, unless the smallness of the diocese or the limited number of cases suggests otherwise.

§ 2. The judicial Vicar constitutes one tribunal with the Bishop, but cannot judge cases that the Bishop reserves to himself.

§ 3. The judicial Vicar can be given assistants, who are called associate judicial Vicars or 'Vice-officiales'.

§ 4. The judicial Vicar and the associate judicial Vicars must be priests of good repute, with a doctorate or at least a licentiate in canon law, and not less than thirty years of age.

§ 5. When the see is vacant, they do not cease from office, nor can they be removed by the diocesan Administrator. On the coming of the new Bishop, however, they need to be confirmed in office.

SOURCES: § 1: c. 1573; SCPF Decl., 7 apr. 1927; Signatura Litt., 24 iul. 1972, n. 2
§ 2: c. 1573 § 2; Signatura Litt., 24 iul. 1972, n. 2
§ 3: c. 1573 § 3
§ 4: c. 1573 § 4; PrM 21
§ 5: c. 1573 § 5

CROSS REFERENCES: cc. 87 § 1, 129, 131 §§ 1–2, 149, 221, 381 § 1, 382, 391 § 2, 416–430, 463 § 1,2°, 833,5°, 1419 § 1, 1425 §§ 3 et 5, 1426 § 2, 1432, 1445 § 3,1°, 1449 § 2, 1608 §§ 1–3, 1673,3°–4°, 1685, 1686

COMMENTARY

Zenon Grocholewski

1. This canon refers to the judicial vicar and associate judicial vicars, as well as to the need to establish a tribunal.

2. *Obligation to establish the tribunal*

The obligation, listed in § 1, of each diocesan bishop to appoint a judicial vicar, is practically the same as the obligation of each diocesan bishop (and those equivalent in law see the introduction to this title, no. 9) to establish his own tribunal of first instance.

With respect to this obligation, it is noteworthy that military ordinaries are exempt from this rule. *SMC*, XIV provides that: "For judicial cases of the faithful of a military ordinariate, the tribunal of the diocese where the curia of the military ordinariate have their See has competence in the first instance". Nevertheless, the Code does not exclude the possibility that a military ordinariate might establish its own tribunal.

The *SMC* does not oblige the military ordinary to set up his own tribunal because his jurisdiction is cumulative with that of the diocesan bishop. That is because "persons that belong to the ordinariate do not cease to be members of the faithful of the particular church of their rite or domicile" (*SMC*, IV). In other words, the military ordinary does not have an obligation to constitute his own tribunal because the faithful belonging to the ordinariate already have a tribunal of first instance at their disposition. That is because the faithful also belong to a diocese, eparchy, or circumscription. Therefore, even though there may be no tribunal in an ordinariate, its faithful do not necessarily have to present their suits to the tribunal of the diocese in which the curia of the ordinariate is based. The faithful may instead present their suits in jurisdictions with which they have a cumulative relation.

If for any reason the faithful do not have this tribunal, or should no tribunal be functioning in the diocese where the military ordinariate has its seat, the military ordinary would have a grave obligation to insure that persons under his pastoral care have recourse to a functioning tribunal.

(See commentary on c. 1419: no. 1; see also the introduction to this title, no. 9).

With regard to practice, military ordinaries normally do not constitute their own tribunals for good reason.[1] Little benefit can be derived from needless multiplication of institutions, especially when there is a shortage of qualified personnel. In addition, since the faithful of the military ordinariate are typically scattered throughout the territory of many dioceses, it is normally easier for them to have recourse to their own diocesan tribunal. The Const. *SMC* does not force military ordinariates to establish their own tribunals. It does not even recommend that military ordinariates establish their own tribunals.; On the contrary, the Const. *SMC* considers it better not to set up such tribunals..

The diocesan bishop may fulfill his obligation to constitute a tribunal by forming the tribunal in association with other diocesan bishops as stipulated in c. 1423. However, as also stipulated by c. 1423, there are some circumscriptions that can neither establish their own tribunals nor be part of interdiocesan tribunals. In such cases, the diocesan bishop or his equivalent in law is obliged by divine law to ensure that his faithful have recourse to a tribunal of first instance. The only solution in such cases is to find a tribunal in a neighboring circumscription that is prepared to received the cases, and then to petition the Apostolic Signatura for permission (according to *PB* 124, 3°: see commentary on c. 1445: no. 6) to extend competence to the neighboring tribunal.

This seems to be the necessary solution for the missions *sui iuris* enumerated in the *Annuario Pontificio* after the Apostolic Administrations (see the introduction to this title, no. 9), taking into account the small number of faithful that belong to these entities. The Apostolic Signatura must intervene in these cases and must remind bishops that they exceed their competence by entrusting cases of their circumscription to tribunals of other circumscriptions, since the power of transferring or extending competence belongs exclusively to the Apostolic See.[2]

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1. Cf. E. BAURA, "L'ufficio di Ordinario militare. Profili giuridici," in *Ius Ecclesiae* 4 (1992), pp. 409–410.

2. Cf., in the Apostolic Signatura, e.g. prot. nos.: 13.358/81 CP (Litt., June 25, 1981 and July 17, 1981); 14.256/82 VT (Litt., September 23, 1982); 20.225/88 CP (Decr. August 18, 1988); 20.441/88 CP (Decr., February 24, 1989); 20. 576/88 CP (Decr., March 22, 1989); 20.919/89 CP (Decr., June 22, 1989); 21.093/89 CP (Decr., July 7, 1989); 140/89 SAT (Litt., June 19, 1989); 605/90 SAT (Litt., June 4, 1990); 23.711/92 VT (Litt., March 8, 1993, no. 2b); 3131/94 SAT (Litt., March 11, 1994); 3166/94 SAT (Litt., March 2, 1994); 3170/1/94 SAT (Litt., March 12, 1994); 3205/94 SAT (Litt., March 24, 1994); 3208/94 SAT (Litt., February 24, 1994); 3272/2/94 SAT (Litt., January 10, 1994).

3. *Ordinary vicarious power of the judicial vicar* (§§ 1–2)

The diocesan tribunal is the tribunal of the diocesan bishop (cf. c. 1438,1°: *tribunal Episcopi, tribunal Metropolitae*). In effect in this tribunal, the judicial vicar and other judges (cf. c. 391 § 2) exercise the judicial power that the diocesan bishop received by divine law in his episcopal ordination (see commentary on c. 1419: no. 1). In this regard, one should keep in mind the words of c. 1419 § 1: "In each diocese ... the judge of first instance is the diocesan bishop. He can exercise his judicial power ... through others". Consequently, the power that the judicial vicar and the judges on the tribunal have is ordinary vicarious power (see commentary on c. 131 §§ 1–2). As a result, "the judicial vicar constitutes one tribunal with the bishop" (§ 2). He depends upon the bishop and obviously "cannot judge cases which the Bishop reserves to himself" (§ 2).

With respect to this dependence upon the diocesan bishop, the Apostolic Signatura has pointed out that: "the Bishop and the Official are intimately associated in the administration of justice, in such a manner that the Bishop is charged with overseeing the conduct of the judges and ministers of his tribunals ... . Obviously, without affecting the provisions of the law, especially in c. [1608] concerning a judgment made in conscience, it is not licit for the Official to assume a leadership role in place of the Bishop. Instead, the Official should keep the Bishop informed of all that is happening in a tribunal and provide the Bishop, when asked, with acts of a case and a copy of pronounced sentences."[3]

This subordination of the official to the diocesan bishop affects the constitution, functioning, and discipline of the tribunal (see commentary on c. 1419: no. 5). Yet it does not affect the trial in and of itself, since the judge should make his decision based upon the dictates of his own conscience and should not be obligated to adapt the opinion and precept of the bishop (c. 1608).

4. *Names* (§§ 1 and 3)

In order to express this dependence with regard to the diocesan bishop, the traditional names of "Officialis" and "Vice-officialis" have been modified in the new *CIC* to *Vicarius iudicialis* and *Vicarius iudicialis adiunctus*. The old nomenclature remains, together with the new names, only in §§ 1 and 3 of this canon, perhaps to underline that those sections deal with the same office. In all other canons of book VII, the new names alone are used.

3. Circ., July 24, 1972, nos. 2 and 4, in *Periodica* 62 (1973), p. 588; cf. also Signatura, *decr.*, May 12, 1990, no. 5, prot. no. 20.924/89 VT.

5. *Judicial vicar distinct from the vicar general* (§ 1)

The disposition of § 1, according to which the judicial vicar is to be "a person distinct from the vicar general" is justified by the fact that they are parallel offices of a different nature. The diocesan bishop exercises his judicial power by means of the judicial vicar, and his executive or administrative power (c. 391 § 2) by means of the vicar general. Number 7 of *Principles* (1967) states: "one should clearly distinguish between the diverse functions of the ecclesiastical powers, that is to say, the legislative, administrative and judicial functions, and adequately establish which are the organs that are to exercise each one of these functions."[4] The possible cumulation of the two offices might find its only justification in the small size of the diocese or the limited number of cases.

6. *Specific tasks of the judicial vicar* (§ 1)

The canon gives particular importance to the judicial vicar (§§ 1–3). He is charged with managing the work of the tribunal according to the directives of the diocesan bishop. His tasks include designating judges for each case (c. 1425 § 3), substituting judges when necessary (c. 1425 § 5), judging the recusal of judges (c. 1449 § 2), and presiding over the college of judges (c. 1426 § 2). In marriage nullity cases, the vicar's duties include notifying the ordinary of the place in which the marriage was celebrated of the executory sentence (c. 1685) and either declaring the nullity of the marriage or designating a judge to declare that the case enter the documentary process (c. 1686). In marriage nullity cases, the judicial vicar of the domicile of the defendant, upon having heard the defendant, must grant or deny consent, so that the tribunal of the plaintiff or the one with the greatest share of evidence may be competent (c. 1673,3°–4°).

Because of the importance of his office, the judicial vicar is obligated to make a profession of faith in the presence of the diocesan bishop or his delegate (c. 833,5°), besides taking the oath of all members of any tribunal (c. 1454). Likewise, in his capacity as a member of the diocesan Synod, he must be summoned to and participate in meetings of that assembly (c. 463 § 1,2°).

7. *Associate judicial vicars* (§ 3)

Paragraph 3 establishes that assistants can be appointed for the judicial vicar. The responsibilities of these assistants are strictly tied to those of the judicial vicar, in the sense that it is the main duty of the judicial

4. *Comm.* 1 (1969), p. 83.

vicar and his associate judicial vicars to preside over the colleges of judges (c. 1426 § 2). These assistants may also substitute for the judicial vicar, especially in situations where he is impeded or absent.

8. *Minimum requisite qualities for the judicial vicar and for the associate judicial vicar* (§ 4)

These ministers must be priests, not lay people (cf. cc. 129 and 274 § 1) or deacons. Obviously, the diocesan bishop cannot assume the office of judicial vicar (cf. § 1) or associate judicial vicar, but there is nothing to prevent the office from being entrusted to a coadjutor or auxiliary bishop (cf. c. 403). Of course, the office of judicial vicar or associate judicial vicar may be given without distinction to a diocesan priest or a priest of a religious order.

These ministers must be of good repute (*integra fama*). The *CIC* expressly requires this for persons who work in the administration of justice and for notaries in general (c. 483 § 2). In addition, *bona fama* is a requirement for advocates and procurators (c. 1483). Clearly, *CIC* places a great deal of importance on the moral integrity of those who deal with canon law. Here, *good repute (integra fama)* means more than just *good reputation (bona fama)*. In addition to what is implied by one's having a good reputation, good repute presupposes that no one can reasonably level against the person any accusation which might morally compromise this good repute. The judgment of this quality is left to the diocesan bishop competent for this appointment. In any event, criminal acts such as calumny and defamation (cf. c. 1390 §§ 2–3) *per se* should not be considered as damaging to good repute.

The judicial vicar has to be no less than thirty years of age. This requirement is related to the requirements of good repute and academic preparation, since both intellectual maturity and the ability to make sound judgments are related to one's experience of life. The requirements are normally reinforced and verified by the various responsibilities ministers have discharged.

All of these aforementioned qualities denote the suitability for this office. They presuppose, of course, that the individual is in communion with the Church (c. 149 § 1).

Regarding the provisions of this office when these requirements are not met, see c. 149 § 2.

9. *Required academic titles* (§ 4)

The task of the ecclesiastical judge is particularly difficult, especially in cases of marriage nullity.[5] The Signatura has noted in letters to different tribunals that, to properly perform the functions of ecclesiastical judge, the following is required: *a*) solid understanding of canon law, both substantial and procedural, *b*) knowledge of the jurisprudence of the Rota, *c*) experience, and *d*) certain special qualities.[6]

The *CIC*/1917 (cc. 1573 § 4, 1574 § 1, 1589 § 1) required that the judicial vicar, associate judicial vicar, other judges, the promoter of justice, and the defender of the bond be experts in canon law. The current *CIC* requires that these officers hold doctorates or at least licentiates in canon law (cf., cc. 1421 § 3 and 1435). Compared to *CIC*/1917, the current simplified process "precisely requires a better preparation on the part of the administrators of justice, that is to say, a more profound understanding on their part of the fundamental principles which ground the process, a more penetrating grasp of the spirit informing canonical legislation, and a capacity to interpret these norms by the light of tradition and context. In the absence of such a preparation, the Church would risk having its canon law fall into an unacceptably strict formalism. This would entail extravagant efforts at interpretation as well as the subsequent distortion of the tribunals' activity, with inevitable pastoral harm."[7]

The canon states that the diocesan bishop is obliged to insure that the administrators of justice in his diocese have received the necessary preparation. This demand for due preparation of the administrators of justice is closely linked to the basic right of the faithful to judicially vindicate and defend their rights (c. 221). Any lack of preparation of the administrators of justice would represent a grave offense against this right of the

5. Cf. Z. GROCHOLEWSKI, "Aspetti teologici dell'attività giudiziaria della Chiesa," in *Teologia e diritto canonico* (Vatican City 1987), pp. 203–205; also in *Monitor Ecclesiasticus* 110 (1985), pp. 498–501; German trans. in a separate fascicle: *Theologische Aspekte der kirchlichen Gerichtsbarkeit* (Münster 1986), pp. 14–19; English trans. in *The Jurist* 46 (1986), pp. 561–564; another English trans. in *Incapacity for Marriage. Jurisprudence and Interpretation* (Acts of the Third Gregorian Colloquium) (Rome 1987), pp. 15–19.

6. Cf., in the Apostolic Signatura, above all the SAT (Status et activitas tribunalium). Cf. also Z. GROCHOLEWSKI, "Probleme kirchlicher Ehegerichtsbarkeit heute," in *Österreichisches Archiv für Kirchenrecht* 33 (1982), pp. 403–406; Italian vers., "Problemi attuali dell'attività giudiziaria della Chiesa nelle cause matrimoniali," in *Apollinaris* 56 (1983), pp. 153–156; idem "Current Questions Concerning the State and Activity of Tribunals, with Particular Reference to the United States of America," in *Incapacity*..., cit., pp. 227–232; Italian vers., "Alcune questioni attuali concernenti lo stato e l'attività dei tribunali, con particolare riguardo alla situazione negli USA," in *Monitor Ecclesiasticus* 114 (1989), pp. 352–355; idem "Processi di nullità matrimoniale nella realtà odierna," in *Il processo matrimoniale canonico* (Vatican City 1988), p. 20; idem "Cause matrimoniali e 'modus agendi' dei tribunali," in *Ius in vita et in missione Ecclesiae. (Acta Symposii Internationalis Iuris Canonici)* (Vatican City 1994), pp. 961–963.

7. Z. GROCHOLEWSKI, "Cause...," cit., p. 962.

faithful, since it would be inherently impossible for these officers to exercise their responsibilities adequately.

It should be strongly emphasized that the academic title in itself, without experience or proper understanding (especially considering the present state of the study of canon law[8]), is insufficient for someone to duly perform the function of judicial vicar or associate judicial vicar. Consequently, it would be puzzling for a person to be appointed right after his completion of studies in canon law without having gained any experience in the matter.

10. *Dispensation from the required academic degrees* (§ 4)

It should be pointed out that the diocesan bishop cannot dispense "from procedural laws" (c. 87 § 1). Therefore, he cannot dispense with the requirement of academic degrees or any other qualification that the *CIC* requires for the administrators of justice. The Apostolic Signatura is the only tribunal that has this faculty by virtue of *Pastor Bonus* 124,2° (see commentary on c. 1445: no. 6). The opinion voiced from time to time that the diocesan bishop may dispense with the requirement for an academic title, inasmuch as this is not strictly a procedural requirement,[9] lacks any basis whatsoever. The Apostolic Signatura considers dispensations regarding academic degrees for the administrators of justice as a procedural requirement beyond doubt. In effect, *a*) these norms are included in the book *De processibus*, *b*) the protection of the rights of the faithful seeing justice before ecclesiastical tribunals is guaranteed not only according to the *dynamic* part of procedural law (cc. 1501ff), but also by the *static* part (cc. 1400–1500), and in a particular way by the preparation and professional competence of the administrators of justice. c) because the requirement of academic degrees is aimed at assuring that protection, it belongs to procedural law, and *d*) the Apostolic Signatura has constantly considered these norms to be an integral part of procedural law. As, a consequence, once the new Code came into effect, it constantly, *a*) reminded moderators of tribunals (see commentary on c. 1419: no. 5 and to c. 1423: no. 9) that appointing judges or defenders of the bond without the required academic degrees is illegitimate, *b*) affirmed the proper and exclusive competency for the examination of petitions for dispensation in this realm, without finding substantial dissent, neither in doctrinal level or on the part of the episcopate or the judicial vicars, and *c)* prohibited the diocesan bishop in the Latin Church from dispensing his officers from these norms, by virtue of c. 87 § 1 and others. Because this canon refers to the power to dispense the *faithful*, whenever it would "*contribute to their*

8. Cf. ibid.
9. Cf., e.g., in the Apostolic Signatura, prot. nos. 23.185/92 VAR, 1006/94 SAT.

spiritual welfare," it frankly is not clear how a dispensation from the academic title requirement could contribute to the personal spiritual benefit of an administrator who is granted that dispensation.[10]

Moreover, the PCILT believes that the diocesan bishop cannot dispense with the requirement for academic degrees (cc. 1420 § 4, 1421 § 3, 1435).[11] In addition, the PCCICR has already foreseen these issues.[12] The *mandatum speciale* of John Paul II, granted to the Apostolic Signatura on November 25, 1993, clearly assumes it, when it bestows the faculty for exempting the administrators of justice of the Eastern Churches from these academic titles, notwithstanding the provisions of c. 1537 of *CCEO*.[13]

The diocesan bishop is the only one who may ask for a dispensation from the academic requirements since it is he who has the responsibility for naming officers in his dioceses.[14] The petition for such dispensation should include the *curriculum vitae* of the candidate, with special attention to his preparation in canon law and his experience in the judicial sector. Additional data should be included, such as personal talents, capacity, proper understanding of marriage, etc. In addition, the petitioner should indicate the need for naming or maintaining this person to the exercise of judicial activity (see c. 90 § 1 and c. 63 §§ 1–2).

Depending upon the circumstances and needs of the diocese, the Apostolic Signatura may grant the dispensation without limitation or for a specific amount of time. It may also deny the dispensation. It may grant the dispensation conditionally or with certain limitations. In any event, each dispensation is granted only for a specific office in a specific tribunal. It does not apply for a different tribunal.

Each decree of dispensation makes clear to the bishop or bishops responsible for the tribunal their obligation to ensure that the ministers of the tribunal possess the qualifications required by law. Of late, persons who have received a dispensation have also been exhorted to dedicate themselves to obtaining a deeper knowledge of canon law, above all in the areas of marriage, processes, and the jurisprudence of the Roman Rota. The defenders of the bond have been exhorted to pay close attention to the address of John Paul II of January 25,1988[15] to the Roman Rota.[16]

10. Signatura, *Letters*, July 3, 1992 and February 1, 1994, prot. nos. 23.185/92 VAR, 1006/94 SAT.
11. *Letter* to the Apostolic Signatura, November 8, 1993, prot. no. 3872/93 (in the Apostolic Signatura, prot. no. 23.185 /92 VAR).
12. *Comm.* 15 (1984), p. 55.
13. SEC, *Letter*, November 26, 1993, prot. no. 338.462 (in the Apostolic Signatura, prot. no. 23.185 /92 VAR).
14. Cf., in the Apostolic Signatura, e.g., *Letter*, February 25, 1994, prot. no. 4028/94 SAT.
15. *AAS* 80 (1988), pp. 1178–1185.
16. Cf. regarding the ample documentation kept in the Apostolic Signatura, in the *positiones* SAT (*Status et activitas tribunalium*).

11. *In the case of a vacant See* (§ 5)

The final paragraph of this canon regarding a vacant see (cf. cc. 416–430) and the taking of possession of the diocese by the new bishop (cf. c. 382) centers on two demands.

First, the continuation of the administration of justice while the episcopal see is vacant. The canon establishes that in these situations, *a)* unlike the vicar general or the episcopal vicar (cf. c. 481 § 1), neither the judicial vicar nor the associate judicial vicars may cease from their duties, and b) neither the judicial vicar nor the associate judicial vicars may be removed from their office by the diocesan administrator (concerning the diocesan administrator, cf. above all cc. 418 § 2, 421 and 427 § 1), not even if the diocesan administrator was the bishop who appointed them (c. 418 § 2,1°);

Second, strict adherence to theological reality, which stipulates that the judicial vicar (and the tribunal) exercise a power which is *proper* to the diocesan bishop who presides over a tribunal. The cannon establishes that, once a new bishop takes possession of his diocese, the judicial vicar and associate judicial vicars require his confirmation to remain in office. If by chance they do not receive the new bishop's confirmation, a type of removal from office takes effect, for which, contrary to the provisions of cc. 1422 and 193 §§ 1–2, serious reasons need not be adduced.

In any event, since the diocesan administrator has the same obligations and powers as the diocesan bishop, except what has been excluded by the nature of things or by the law itself (c. 427 § 1), the diocesan administrator may appoint the judicial vicar and necessary associate judicial vicars when the office of bishop becomes vacant. But when the new bishop takes possession of office, the administrator's appointments must be confirmed. Considering the obligations and powers of the diocesan administrator, he possesses the competence to carry out the actions listed in the commentary on c. 1419: no. 5, with the exception of removing the judicial vicar and associate judicial vicars.

1421 **§ 1. In dioecesi constituantur ab Episcopo iudices dioecesani, qui sint clerici.**

§ 2. Episcoporum conferentia permittere potest ut etiam laici iudices constituantur, e quibus, suadente necessitate, unus assumi potest ad collegium efformandum.

§ 3. Iudices sint integrae famae et in iure canonico doctores vel saltem licentiati.

§ 1. In each diocese, the Bishop is to appoint diocesan judges, who are to be clerics.

§ 2. The Bishops' Conference can permit that lay persons also be appointed judges. Where necessity suggests, one of these can be chosen in forming a college of judges.

§ 3. Judges are to be of good repute, and possess a doctorate, or at least a licentiate, in canon law.

SOURCES: § 1: c. 1574 § 1; *CM* V § 1; Signatura Decr., 9 aug. 1972
§ 2: c. 1574 § 1; *CM* V § 1
§ 3: c. 1574 § 1; *PrM* 21; *CM* VII

CROSS REFERENCES: cc. 129, 149, 266 § 1, 274 § 1, 1099 § 1, 1425 §§ 1–2 et 4, 1449 §§ 1–2

COMMENTARY

Zenon Grocholewski

1. The diocesan bishop and his equivalents in law (see the introduction to this title, no. 9) are obliged by this canon to appoint judges in addition to the judicial vicar and associate judicial vicars. The canon establishes the minimum qualifications for these positions.

1. *Obligation to appoint other judges* (§ 1)

This obligation is justified by the fact that most cases heard by ecclesiastical tribunals are reserved for a college of three judges and that some cases must be heard by a college of five judges (cf. c. 1425 §§ 1–2). Moreover, there is the necessity to adequately define all the cases that are presented. Finally, circumstances might require the substitution of a judge, as

contemplated by c. 1448 § 1, or in the case of recusal of a judge (cf. c. 1449 §§ 1–2).

In any event, the *CIC*, in contrast to *CIC*/1917 (c. 1574 § 1), does not establish the exact number of judges that need to be appointed. Obviously, the number will depend upon the needs of the diocese. When a bishop in a small diocese or equivalent circumscription is authorized (pursuant to c. 1425 § 4) to entrust cases otherwise reserved to a college of judges to a sole judge, and the sole judge is capable of resolving them lawfully, then a diocesan bishop would not be acting contrary to the law by appointing only a judicial vicar.

In any case, the number of judges should be sufficient to satisfy the ordinary needs of the diocese. If, in a particular case, the number of judges should prove insufficient, the bishop may appoint a judge *ad casum* (see commentary on c. 1419: no. 4) who will judge by virtue of delegated power (cf. c. 131 § 1).

2. *Required qualities* (§§ 1 and 3)

Besides the requirement that a judge must be in communion with the Church (c. 149 § 1), the canon gives three other qualifications that judges must fulfill. First, they must be *clerics*. Consequently, in contrast to the qualifications for judicial vicar and associate judicial vicar (cf. c. 1420 § 4), judges do not have to be priests and may be deacons (cf. cc. 266 § 1, 1009 § 1). Second, they must be *of good repute* (*integra fama*) (see commentary on c. 1420: no. 8). Third, they must *posses a doctorate, or at least a licentiate, in canon law* (see commentary on c. 1420: nos. 9–10). Unlike judicial vicars and associate judicial vicars, there is no age requirement.

Regarding the provision of this office when the candidate does not meet some qualification, see c. 149 § 2.

3. *Lay judge* (§ 2)

Under certain circumstances, the bishop may appoint a lay person to be a judge, an issue that was the subject of extensive debate in the PC-CICR. The debate is related to the theological question concerning the laity and their power of jurisdiction.[1] There are various opinions on this

1. Cf. *Comm.* 2 (1970), p. 184; 3 (1971), p. 187; 10 (1978), p. 231; 14 (1982), pp. 146–149; 16 (1984), pp. 54–55; *Acta et documenta Pontificiae Commissionis Codici Iuris Canonici Recognoscendo: Congregatio Plenaria diebus 20–29 octobris 1991 habita* (Vatican City 1991), pp. 35–97, 190–229, 493–495.

topic,[2] and further doctrinal clarifications are in order. Nevertheless, from the point of view of practice, it is mandatory that the legislator has provided concerning this matter.

Since the provision regarding lay judges constitutes an exception to the law (of cc. 1421 § 1 and 274 § 1), it should be interpreted literally (c. 18). Therefore, for the diocesan bishop to appoint lay judges, permission from the bishops' conference is required. This is unlike what is set forth in art. V § 1 of the m.p. *CM*, according to which the bishops' conference, upon granting this permission, is limited by the fact that in a certain tribunal three clerical judges could not be appointed. According to 1421 § 1, the bishops' conference can grant a general permission,[3] even though the particular needs of each diocese ought to be examined. (Of the 46 bishops' conferences whose legislation has been published by Martin de Agar,[4] 25 have granted this permission, 19 have granted it without establishing any provisions in this regard, and two have explicitly decided against granting it).

Even when a bishop has obtained the bishops' conference permission and the lay judges have been legitimately appointed in a stable way, the lay judges may be entrusted cases only when there is a real need in the diocese, although this would not appear to refer to each specific case, but to situations which could affect the diocese for extended periods of time.[5] Consequently, if there is no justification for entrusting cases to lay judges, it is preferable that the bishop entrust cases to clerical judges.

Each lay judge may function only as the sole lay member of a college in which the other judges are clerics. The lay judge may never act as a sole judge and there can never be two or more lay judges in a college. If a lay judge were to act as a sole judge or there were to be two or more lay judges in a college, judgment would be null and void pursuant to c. 1620,2°.[6] Nonetheless, within the college the lay judge is a true judge with the same judicial power as the other members of the tribunal.

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2. Cf. previous note and, e.g., J.H. PROVOST, "The Participation of the Laity in the Governance of the Church," in *Studia Canonica* 17 (1983), pp. 418–430; E. MCDONOUGH, "Laity and the Inner Working of the Church," in *The Jurist* 47 (1987), pp. 231–237; R. PAGÉ, "Juges laïcs et exercice du pouvoir judiciaire," in M. THÉRIAULT-J. THORN, (eds.), *Unico Ecclesiae servitio* (Ottawa 1991), pp. 204–209; K. LÜDICKE, in *Münsterischer Kommentar zum Codex Iuris Canonici* (Essen seit 1985) (Loseblattwerk), Stand: 22. Erg.-Lfg. November 1993, vor 1421.
3. Cf. *Comm.* 10 (1978), p. 231; K. LÜDICKE, in *Münsterischer Kommentar...*, cit., 1421, 4.
4. J.T. MARTÍN DE AGAR, *Legislazione delle Conferenze Episcopali comlementare al CIC* (Milan 1990).
5. Cf. K. LÜDICKE, in *Münsterischer Kommentar...*, cit., 1421, 7.
6. In that sense there is also a vote, but strictly private in nature, in the Apostolic Signatura, prot. no. 19.558/87 VT.

4. *Dispensation for the required academic degree for a lay judge*

The Apostolic Signatura usually does not dispense a lay candidate from the required academic degree so he may carry out the office of the judge. This is because it would represent an exception to the general rule of c. 1421 § 1 (cf. also c. 274 § 1), which should be interpreted strictly (c. 18).[7] Nevertheless, in certain exceptional cases, the Signatura has granted this dispensation.[8] The Signatura will more readily grant a dispensation to a lay person for the required academic degree when the lay person is applying to be defender of the bond.

5. *Can a lay judge exercise the function of the president of a judicial college?*

The Apostolic Signatura has provided a negative response to the question whether a lay judge can act as president of a judicial college, affirming that it would not seem possible (*omnino non convenit*) if one keeps in mind that, according to c. 1426 § 2, the judicial vicar or associate judicial vicar should preside over the collegiate tribunal. Moreover, the president exercises a certain power over the other judges of the college (cf. cc. 1428 § 1, 1429, 1609 §§ 1 and 3), and § 2 of c. 1421 is an exception to § 1 of the same canon. Thus, § 2 needs to be interpreted strictly (c. 18).[9] Consequently, upon learning that a tribunal has acted in this manner, the Signatura has reacted appropriately. For example, in a case where a priest appeared as president of a collegiate tribunal, even though the person who was actually presiding over that tribunal was a lay judge).[10]

6. *Can a lay judge exercise the function of an arbitrator?*

The code allows for lay judges to carry out the function of arbitrators, although c. 1609 § 2 must be observed. This canon states that the judges, after careful study of the acts, should bring their written conclusions on the merits of the case, along with the reasons both in law and in

7. Cf., e.g., in the Apostolic Signatura, prot. nos.: 4012/92–93 SAT (*decr.*, December 19, 1992 and January 28, 1993); 4015/92 SAT (*Letter*, June 26, 1992); 4147/89–90 SAT (*decr.*, September 26, 1989 and February 13, 1990); 4013/89 SAT (*decr.*, December 1, 1989); 4014/90 SAT (*decr.*, April 6, 1990 and February 6, 1991).

8. Cf., e.g. in the Apostolic Signatura, prot. nos.: 4013/89 SAT (*decr.*, December 1, 1989); 4014/90 SAT (*decr.*, April 6, 1990); 4015/92 SAT (*letter y decr.*, June 26, 1992); 4147/93 SAT (*decr.*, Sepetember 1, 1993).

9. Cf., e.g., *Decr.*, November 25, 1988, no. 5, prot. no. 20.045/88 VT; *Letter*, January 12, 1989, prot. no. 19.797/88 VT; *Letter*, April 27, 1993, prot. no. 24.242/93 VT; *Letter*, April 30, 1993, prot. no. 24.001/93 VT; cf. also R. PAGÉ, "Juges...," cit. p. 209.

10. Cf. previous note: 1st, 3rd and 4th citations.

fact for reaching their conclusions. The Apostolic Signatura concludes, "In effect, the most thorough examination of the acts performed only by the lay judge, and not by the other cleric judges, undoubtedly does not correspond to the sense of cc. 1421 §§ 1–2 and 1609 § 2, above all if we consider cc. 129 § 2 and 274 § 1."[11] This is not only a violation of c. 1609 § 2, but also an attempt to defraud the intent of the law that the sole judge may only be a cleric.[12]

7. *A lay judge in cases which "could involve the reputation of a priest"*

The question whether a lay judge could form part of a collegiate tribunal to judge a case involving the reputation of a priest is essentially problematic. It would not make sense for lay judges to have this power, since in such cases the notary must be a priest (c. 483 § 2).[13] In any event, the Church does allow lay judges to hear marriage cases, which are the majority of cases for most tribunals. In contrast, cases in there might be risk to the reputation of a priest are so rare that in reality that there is probably little need (cf. § 2) for a lay person to form part of such collegiate tribunals.

Upon receiving the permission stipulated in c. 1421 § 2, the Philippine Bishops' Conference has established that a lay judge "may not be a judge in cases concerning clerics, or in cases concerning the declaration or imposition of interdict or excommunication."[14]

11. *Letter*, January 12, 1989, prot. no. 19.797/88 VT.
12. Signatura, *Letter*, April 27, 1993, prot. no. 24.242/93 VT; *Letter*, April 30, 1993, prot. no. 24.001/93 VT.
13. Cf. R. PAGÉ, "Juges...," cit., p. 203.
14. In J.T. MARTÍN DE AGAR, *Legislazione...*, cit., p. 243.

1422 **Vicarius iudicialis, Vicarii iudiciales adiuncti et ceteri iudices nominantur ad definitum tempus, firmo praescripto can. 1420 § 5, nec removeri possunt nisi ex legitima gravique causa.**

The judicial Vicar, the associate judicial Vicars and the other judges are appointed for a specified period of time, without prejudice to the provision of can. 1420 § 5. They cannot be removed from office except for a lawful and grave reason.

SOURCES: cc. 588, 1574 § 2

CROSS-REFERENCES: cc. 146–157, 184–196

COMMENTARY

Zenon Grocholewski

1. *Appointment for a specified period of time*

All judges, including judicial vicars and associate judicial vicars, are to be appointed for a specific period of time. The intention of the Canon is to avoid disagreeable means for removal from office, would likely arise if the office were to be held for life or *ad beneplacitum nostrum*. Nevertheless, the duration of appointments is left to the discretion of those appointing the judges. Some bishops' conferences (for example, in Austria and Switzerland) have established that the appointments of judges, including appointments of judicial vicar and associate judicial vicars, are for periods of five years.[1] When a judge completes his term of office, nothing prevents the appointment from being renewed.

In any event, if their terms of office expire when a See is vacant, the judicial vicar and associate judicial vicars do not cease to hold their offices. Rather, they remain in their offices until the new diocesan bishop is installed (see commentary on c. 1420: no. 11). The terms of office of the other judges are not extended.

The diocesan bishop must appoint judges by free conferral (cf. cc. 145 and 157) and in writing (cf. c. 156).

1. Cf., respectively, K. LÜDICKE, in *Münsterischer Kommentar zum Codex Iuris Canonici* (Essen seit 1985) (Loseblattwerk), Stand: 22. Erg.-Lfg. November 1993, 1422, 6; J.T. MARTÍN DE AGAR, *Legislazione delle Conferenze Episcopali complementare al CIC* (Milan 1990), p. 706.

2. *Stability of the judges*

According to *CIC*/1917 (c. 1573 § 5), the judicial vicar and associate judicial vicars were *amovibiles ad nutum Episcopi*. In contrast, the *CIC* has sought to provide all judges with stability of office to protect their dignity[2] and independence.[3] The *CIC* establishes that judges cannot be removed from office except for lawful and grave reasons (cf. cc. 192, 193 §§ 1–2 and 3, 194). Clearly, judges can be removed from office for lawful and grave reasons. (cc. 184ff).

2. Cf. *Comm.* 8 (1976), p. 186; A. SABATTANI, "Praecipuae innovationes in schemate iuris processualis Novi Codicis Iuris Canonici," in *Kosciól i prawo* 3 (1984), p. 20.

3. K. LÜDICKE, in *Münsterischer Kommentar...*, cit., 1422, 2.

1423 **§ 1. Plures dioecesani Episcopi, probante Sede Apostolica, possunt concordes, in locum tribunalium dioecesanorum de quibus in cann. 1419–1421, unicum constituere in suis dioecesibns tribunal primae instantiae; quo in casu ipsorum Episcoporum coetui vel Episcopo ab eisdem designato omnes competunt potestates, quas Episcopus dioecesanus habet circa suum tribunal.**

§ 2. Tribunalia, de quibus in § 1, constitui possunt vel ad causas quaslibet vel ad aliqua tantum causarum genera.

§ 1. With the approval of the Apostolic See, several diocesan Bishops can agree to establish one tribunal of first instance in their dioceses, in place of the diocesan tribunals mentioned in cann. 1419–1421. In this case, the group of Bishops, or a Bishop designated by them, has all the powers that the diocesan Bishop has for his tribunal.

§ 2. The tribunals mentioned in § 1 can be established for all cases, or for some types of cases only.

SOURCES: § 1: PIUS PP. XI, m. p. *Qua cura,* 8 aug. 1938, I (*AAS* 30 [1938] 410); SCDS Normae, 10 iul. 1940 (*AAS* 32 [1940] 304–308); Signatura Normae, 25 mar. 1968, 18,6°; Signatura Normae, 28 dec. 1970, 1 § 1 (*AAS* 63 [1971] 486–492)
§ 2: PIUS PP. XI, m. p. *Qua cura,* 8 aug. 1938, I (*AAS* 30 [1938] 410)

CROSS-REFERENCES: cc. 1419–1421, 1439, 1445 § 3,3°

COMMENTARY

Zenon Grocholewski

1. *The term that must be used is "interdiocesan tribunals"*

Although interdiocesan tribunals frequently are called *regional* tribunals (the expression employed, at least at the beginning, by the PC-CICR[1] and in various post-conciliar documents[2]), there is no justification

1. Cf. *Comm.* 2 (1970), p. 184; 4 (1972), p. 70; 8 (1976), p. 186.
2. Cf. REU, art. 105; *Normae speciales in Supremo Tribunali Signaturae Apostolicae ad experimentum servandae,* March 25, 1968, arts. 18 and 92, in X. OCHOA, *LE,* vol. III (Rome 1972), cols. 5323 and 5327–5328; Signatura, Litt. circ. *Inter cetera,* December 28, 1970, Intro. and no. 4, in *AAS* 63 (1971), pp. 480–481; Signatura, *Normae pro Tribunalibus interdioecesanis, vel regionalibus aut interregionalibus,* December 28, 1970, in *AAS* 63 (1971), pp. 486–492; CIV, *Resp.,* February 14, 1977, in *AAS* 69 (1977), p. 296.

for this terminology. In effect, interdiocesan tribunals generally are not established according to ecclesiastical regions (cf. c. 433 § 1). Some are formed for a province or for a nation. However, no criterion linked with any ecclesiastical circumscriptions is followed rigorously. Some interdiocesan tribunals encompass some diocese of a province and others the diocese of another province. Some interdiocesan tribunals encompass an entire nation or province, except for one or two dioceses. Regarding the remaining possibilities, the legislator does not impose a specific criterion for following the districts in the Church. Consequently, the only term that should be used is *interdiocesan* tribunal. Indeed, *CIC* refers only to a tribunal that *plures dioecesani Episcopi* (§ 1) might constitute a tribunal that is *unicum ... in suis dioecesibus* (§ 1), *unicum pro pluribus dioecesibus* (c. 1439 § 1), without any other limitations or specifications.

It does not make sense to divide tribunals as provincial, national, or regional, *etc.*, because these divisions in themselves have no relevance in the current legislation.

2. *Reason that the CIC foresees the erection of interdiocesan tribunals*

The explanation for the *CIC*'s foresight in creating interdiocesan tribunals doubtlessly is its awareness of the pastoral importance of ecclesiastical cases (principally those dealing with marriage, which form the bulk of the caseload). This necessitates that judges and others involved in the administration of justice be adequately prepared. Furthermore, there is a shortage of qualified personnel to carry out the functions of ecclesiastical tribunals. Consequently, it may prove easier to find sufficient qualified persons to form a tribunal common to various dioceses than to find sufficient qualified persons in each diocese.[3]

3. *It is the duty of diocesan bishops to constitute those tribunals*

The first interdiocesan tribunals were erected by the Holy Father in Italy.[4] The S. Congr. for Discipline of the Sacraments later erected interdiocesan tribunals in the Philippines, Canada, Argentina, Brazil, Algeria and certain regions of France, Colombia and Chile. In 1968, competence to erect interdiocesan tribunals transferred to the Apostolic Signatura (*REU*,

3. Cf., e.g. PAUL VI. *Allocuzione alla Rota Romana*, January 28, 1978, in *AAS* 70 (1978), p. 183.
4. PIUS XII, M.P. *Qua cura*, December 8, 1938, in *AAS* 30 (1938), pp. 410–413.

art. 105), which in 1970 issued the *Normae pro Tribunalibus interdioecesanis, vel regionalibus aut interregionalibus.*[5] In these *Normae*, it is stated, in accordance with the doctrine of Vatican Council II concerning the power of bishops (cf. especially *Lumen gentium* 27), that it is the concerned bishops who have a duty to erect interdiocesan tribunals (art. 2 § 1). Therefore, § 1 of this canon refers to diocesan bishops and their equivalents in law, whose duty it is to constitute one tribunal for several dioceses. Taking into account cc. 333 § 1 and 381 § 1, it seems unlikely that the Holy See (cf. cc. 360–361) would establish an interdiocesan tribunal (as was expressly foreseen in the *Normae*, art. 1 § 1 and art. 3), although such a case has not arisen since the publication of the *Normae.*

4. *Unanimous decision of the bishops*

Paragraph one states that, in order to constitute an interdiocesan tribunal, the diocesan bishops must be unanimous in their decision. Unlike the *Normae* (cf. art. 2 § 3), the *CIC* did not contain any such requirement. This regulation conforms to the theological principle that the diocesan bishop is the native judge in his diocese (cf. c. 1419). Thus, he is solely responsible for the proper administration of justice in his diocese. The diocesan bishop must decide whether to exercise this responsibility by means of his proper tribunal or in combination with other bishops via the interdiocesan tribunal.

The Apostolic Signatura respects the decision of a bishop to disassociate himself from bishops who have constituted an interdiocesan tribunal, so as to renew his responsibility to judge by means of his own tribunal or to unite with other bishops and form another interdiocesan tribunal,[6] even if the Supreme Tribunal does not regard the disassociation as an opportune course of action.

5. *Intervention of the Apostolic Signatura*

No interdiocesan tribunal may be constituted without the approval of the Apostolic See (*probante Sede Apostolica*); namely, the Signatura (*PB* 124,4°: see commentary on c. 1445).

Although the quoted *Normae* are no longer relevant inasmuch as the law (*REU*, art. 105) for their implementation is without force (cf. c. 33 § 2), nevertheless, in the absence of new indications in this regard and

5. *AAS* 63 (1971), pp. 486–492.
6. Cf., e.g., in the Apostolic Signatura, prot. nos.: 8873/77 VT (*decr.*, June 10, 1985), 533/93–94 SAT, 2296/90 SAT (*decr.*, August 7, 1990), 2311/91 SAT (*decr.*, March 13, 1991), 2319/90 SAT (*decr.*, August 7, 1990).

taking into account c. 19, the existing practice should be substantially maintained , to such a degree that it does not contradict the new law.

Therefore, before they may constitute an interdiocesan tribunal, the interested bishops must request and obtain a *nihil obstat* from the Apostolic Signatura. All interested bishops must sign the resulting decree of erection, and the Apostolic See must approve the decree.

Although express provision is made for the *approbation* of the Apostolic Signatura in this canon, as well as in *Pastor Bonus* 124,4° (see commentary on c. 1445), the request for the *nihil obstat* is relevant for two reasons: *a*) it offers the possibility of resolving ahead of time those questions which the Apostolic Signatura might find difficult to approve; ***b***) the Apostolic Signatura can make constructive suggestions to bishops who are facing this challenge for the first time. These suggestions might relate to options to be considered or to the writing of the decree of erection. It is common in the function of the Apostolic Signatura to *promote* the erection of interdiocesan tribunals (*PB* 124,4°; see commentary on c. 1445).

6. *"In place of the diocesan tribunals"*

Paragraph 1 deals with interdiocesan tribunals are constituted instead of the diocesan tribunals as described in cc. 1419–1421. Thus, the diocesan bishop may exercise his judicial responsibility by means of his own diocesan tribunal or a tribunal that has been constituted collegially with other diocesan bishops. In the latter case, the bishop no longer has the right to have his own tribunal for the same matter (*vide* below, no. 11). In other words, the bishop should provide to erect only one ordinary forum in his diocese. He cannot exercise his judicial responsibility by means of an ordinary and an alternative forum when judging the same matter.

7. *Instructory sections*

For practical reasons, primarily to minimize inconveniences for the parties and witnesses when a tribunal is at a great distance from their places of residence, an interdiocesan tribunal may have *instructory sections* composed of an auditor (cf. c. 1428), a defender of the bond (cf. c. 1432), and a notary (cf. c. 1437). Obviously, there may be more than one of these ministers of the tribunal for each office.

Such instructory sections deal only with the instruction of cases, not the decision of cases, according to the mandate of the judge (cf. c. 1428 § 3).

8. *Interdiocesan tribunals and tribunals the competence of which has been extended*

The interdiocesan tribunal is not to be confused with the tribunal in which competency has been extended pursuant to *Pastor Bonus* 124,3° (see commentary on c. 1420: no. 2, c). The tribunal in which competency has been extended to judge cases of various dioceses does not automatically become an interdiocesan tribunal. It continues being a diocesan tribunal that provides assistance to other dioceses by hearing their cases. A tribunal might be called interdiocesan only when the diocesan bishops of several dioceses, by unanimous decision and with the participation of all, constitute it in accordance with c. 1423 and place it under their mutual responsibility.

9. *Moderator of the interdiocesan tribunal*

In the interdiocesan tribunal, the function of moderator belongs to the *coetus* of bishops who have erected the tribunal or (*vel*) to the bishop designated by the *coetus*.

The designation of the moderator may be made either in a stable manner (e. g., by indicating in the decree of erection that the function of moderator will be performed by the bishop of the dioceses in which the tribunal has the see), or by indicating in the decree of erection that a bishop appointed by the *coetus* will serve as moderator. In the latter case, the *coetus* should elect a specific bishop to serve as moderator.

Concerning specific competencies, see commentary on c. 1419: no. 5.

The conjunction *vel* is not necessarily disjunctive (like *aut*). Thus, one can argue that the *coetus* may reserve certain competencies of the moderator, while entrusting others to the designated diocesan bishop.

10. *Appointment of the ministers*

According to the aforementioned *Normae*, the *coetus* should appoint by an absolute majority of votes the judicial vicar, the other judges, the promoter of justice, and the defender of the bond and his substitutes (art. 5 § 1). Although the *Normae* are no longer in force, the reservation of appointments to the *coetus* (without undermining the fact that a bishop has been appointed as moderator) is not converse to the law. On the contrary, it would seem a good idea to emphasize and exercise in a stable way the responsibilities of all bishops concerning their common tribunal.

Consequently, in cases where that decision has been included in the decree of erection, it will remain in force, since it is not contrary to the law.[7] To change it would require a change in the decree of erection. Recently, the Apostolic Signatura has proposed to the bishops of a nation created two national tribunals (one in the first grade and the other in the second instance), that they amend their decree of erection to introduce the following: *a*) confirmation that the appointment of the judicial vicar, associate judicial vicars, judges, defenders of the bond, and promoters of justice is performed by the bishops' conference by an absolute majority; *b*) determination that in urgent cases the moderator has the power to appoint the judicial vicar, associate judicial vicars, judges, defenders of the bond, and promoters of justice, with the consent of their respective ordinaries, as long as the bishops' conference does not decide on the matter.[8]

11. *For all cases or for some types of cases* (§ 2)

Concerning § 2, the first interdiocesan tribunals were constituted to hear only marriage cases. These tribunals were constituted by the SCDS or with its collaboration. The SCDS was a congregation had competency only in the area of the sacraments.

Once competency on the diocesan tribunals was transferred to the Apostolic Signatura, this institution became prone to the diocesan tribunals being erected for all judicial cases. In effect, if an interdiocesan tribunal were constituted solely for marriage cases, it would be necessary that a tribunal for other cases be erected in each diocese (cf. cc. 1419 § 1 and 1420 § 1). This does not seem appropriate, since there are few cases in ecclesiastical tribunals other than marriage cases. When those rare cases arise, the people normally best qualified to judge them are those already working on an interdiocesan tribunal.

7. Cf., e.g., in the Apostolic Signatura, prot. nos.: 22.839/91 VT–23.211/92 VT (*letter*, January 30, 1992); 23.768/92 VT (*decr.*, January 14, 1994).

8. Prot. no. 23.768/92 VT (*letter*, February 16, 1994); cf. also prot. no. 3002/94 SAT (*letter*, February 23, 1994).

1424 **Unicus iudex in quolibet iudicio duos assessores, clericos vel laicos probatae vitae, sibi consulentes asciscere potest.**

In any trial, a sole judge can associate with himself two assessors as advisers; they may be clerics or lay persons of good repute.

SOURCES: c. 1575; *CM* V § 2, VI et VII; Secr. St. Rescr., 1 oct. 1974

CROSS REFERENCES: cc. 1425 §§ 1 et 4, 1447, 1448 § 2, 1449 § 4, 1454, 1455, (1720,2°)

COMMENTARY

Zenon Grocholewski

Assessors of a sole judge

The task of assessors is to advise on the proper direction of the process and the suitable evaluation of proofs in difficult cases. Assessors are not allowed to pronounce judgment.

The faculty of requesting aid from assessors belongs only to a sole judge, not a collegiate judge. Requesting aid from assessors is a faculty (*potest*), not an obligation (in contrast to what is contemplated in c. 1425 § 4). While it is up to each judge to appoint his own assessors, the judge must evaluate whether nominees possess the requisite qualifications. The judge may not request the aid of more than two assessors, but is not required to have two (cf. c. 1425 § 4).

Assessors may be clerics or laypersons (men or women) of upright conduct (*probatae vitae*). The canon does not mention "reputation" for assessors as it does with judges (cc. 1420 § 4 and 1421 § 3). Assessors do not have to be chosen from among the judges, as was required by c. 1575 *CIC*/1917, but assessors should be experts in matters where their advice is required.

Persons who have participated in a case as a judge, promoter of justice, defender of the bond, procurator, advocate, witness, or expert may not act as an assessor in the same case (c. 1447). In addition, anyone who is under the circumstances enumerated in c. 1448 § 1 must not accept the

assignment of assessor (c. 1448 § 2). If such person accepts the charge, he may be objected to according to c. 1449 §§ 1 and 4.

Assessors must take an oath to exercise their office properly and faithfully (c. 1456). They are bound to observe the secret in accord with c. 1455.

The role of assessor is also foreseen in the administrative procedure for the imposition of a penalty (c. 1720,2°).

1425 **§ 1. Reprobata contraria consuetudine, tribunali collegiali trium iudicum reservantur:**
1° causae contentiosae: a) de vinculo sacrae ordinationis; b) de vinculo matrimonii, firmis praescriptis cann. 1686 et 1688;
2° causae poenales: a) de delictis quae poenam dimissionis e statu clericali secumferre possunt; b) de irroganda vel declaranda excommunicatione.

§ 2. Episcopus causas difficiliores vel maioris momenti committere potest iudicio trium vel quinque iudicum.

§ 3. Vicarius iudicialis ad singulas causas cognoscendas iudices ex ordine per turnum advocet, nisi Episcopus in singulis casibus aliter statuerit.

§ 4. In primo iudicii gradu, si forte collegium constitui nequeat, Episcoporum conferentia, quamdiu huiusmodi impossibilitas perduret, permittere potest ut Episcopus causas unico iudici clerico committat, qui, ubi fieri possit, assessorem et auditorem sibi asciscat.

§ 5. Iudices semel designatos ne subroget Vicarius iudicialis, nisi ex gravissima causa in decreto exprimenda.

§ 1. The following matters are reserved to a collegiate tribunal of three judges, any contrary custom being reprobated:
1° contentious cases: a) concerning the bond of sacred ordination; b) concerning the bond of marriage, without prejudice to the provisions of cann. 1686 and 1688;
2° penal cases: a) concerning offences that can carry the penalty of dismissal from the clerical state; b) concerning the imposition or declaration of an excommunication.

§ 2. The Bishop can entrust the more difficult cases or those of greater importance to the judgement of three or of five judges.

§ 3. The judicial Vicar is to assign judges in order by rotation to hear the individual cases, unless in particular cases the Bishop has decided otherwise.

§ 4. In a trial at first instance, if it should happen that it is impossible to constitute a college of judges, the Bishops' Conference can for as long as the impossibility persists, permit the Bishop to entrust cases to a sole clerical judge. Where possible, the sole judge is to associate with himself an assessor and an auditor.

§ 5. Once judges have been designated, the judicial Vicar is not to replace them, except for the gravest of reasons, which must be expressed in a decree.

SOURCES: § 1: c. 1576 § 1; PrM 13
§ 2: c. 1576 § 2
§ 3: c. 1576 § 3; CI Resp. I, 28 iul. 1932 (*AAS* 24 [1932] 314)
§ 4: CPAC Normae, 28 apr. 1970, 3; SCEP Formula facultatum, 1 ian. 1971, 20; *CM* V § 2; Secr. St. Normae, 1 nov. 1974, 2

CROSS REFERENCES: cc. 5 § 1, 24 § 2, 266 § 1, 1009 § 1, 1364, 1367, 1370 § 1, 1378 §§ 1 et 3, 1382, 1387, 1388, 1394 § 1, 1395, 1397, 1398, 1424, 1426 § 2, 1428, 1609, 1610 §§ 2–3, 1612 § 4, 1622,1°, 1671–1691, 1708–1712

COMMENTARY

Zenon Grocholewski

1. *The collegiate judge* (§§ 1, 2 and 4)

a) *Cases reserved to the collegiate tribunal of three judges* (§ 1)

Paragraph 1 establishes that the sole judge is the general rule in the *CIC*. Cases reserved to a collegiate tribunal of three judges are an exception to this rule; therefore, this reservation must be interpreted in a strict sense (c. 18). With this consideration in mind, it should be noted:

— Among the cases concerning the bond of ordination referred to in cc. 1708–1712, the canon deals only with those that CDWDS (*PB* 68) sends to the tribunal according to c. 1709 § 1 (cf. *PB* 19 § 2).

— The canon refers only to judicial cases concerning the bond of marriage (cc. 1671–1685, 1689–1691). It does not refer to cases of separation, even when they are treated judicially (cc. 1692–1696), causes for dispensation from ratified but non-consummated marriages (cc. 1697–1706; cf. also c. 1681), presumed deaths (c. 1707), or administrative declarations of nullity of marriage by the Apostolic Signatura.[1] Judicial cases concerning the

1. Cf. Z. GROCHOLEWSKI, "Dichiarazioni di nullità di matrimonio in via amministrativa da parte del Supremo Tribunale della Segnatura Apostolica," in *Ephemerides Iuris Canonici* 37 (1981), pp. 177–204; R. BURKE, "La procedura amministrativa per la dichiarazione di nullità del matrimonio," in *I procedimenti speciali nel diritto canonico* (Vatican City 1992), pp. 93–105.

bond of matrimony in cc. 1686–1688 are also excluded from the obligation of the collegiate tribunal.

— Penal cases must result in dismissal from the clerical state are those regarding the offenses in cc. 1364 § 2, 1367, 1370 § 1, 1387, 1394 § 1, 1395 and 1397. They are excluded from the obligation of the collegiate tribunal.

— Penal cases regarding excommunication refer to the offences listed in canons 1378 § 3 and 1388 § 2. They are excluded from the obligation of the collegiate tribunal.

However, cases regarding excommunication refer to the offenses treated in cc. 1364 § 1, 1367, 1370 § 1, 1378 § 1, 1382, 1388 § 1, 1397 and 1398. Those cases are not excluded from the obligation of the collegiate tribunal.

The cases listed in § 1 are reserved to a collegiate tribunal of three judges *reprobata contraria consuetudine.* Consequently, any contrary customs should be completely suppressed and not reinstated (c. 5 § 1; cf. c. 24 § 2). It appears that the contrary custom considered and rejected is that of judging cases by a sole judge, instead of by a tribunal of five judges (cf. § 2).[2]

A judgment not given by the lawful number of judges is null with remediable nullity (c. 1622,1°).

b) *Greater number of judges* (§ 2)

Depending upon the relative difficulty or importance of a case, the diocesan bishop (not the judicial vicar) may entrust a case not reserved by law to a college of judges to a collegiate tribunal of three or five judges. The diocesan bishop may also send a case reserved by law to a college of three judges to a college of five judges. The legislator leaves it to the discretion of the bishop to decide the relative difficulty or importance of a case.

c) *Sole judge in place of a collegiate tribunal of three* (§ 4)

Paragraph 4 provides an exception to § 1. The exception specifies the cases reserved to a collegiate tribunal of three judges. Thus, paragraph 4 is also to be interpreted strictly (c. 18).

In contrast to what is established by c. 1421 § 2 (see commentary on c. 1421, no. 3), for a bishops' conference to grant permission for a sole judge to receive cases reserved by law to a college, it must be impossible to constitute a college of judges (even by including a lay judge, in places where the bishops' conference has given its approval for such inclusion, according to c. 1421 § 2). Permission may be given only for as long as the

2. In that sense M.J. ARROBA CONDE, *Diritto processuale canonico* (Rome 1993), pp. 178–179.

impossibility to constitute a college of judges persists. Certain bishops' conferences have given a general permission. However, such general permissions must be understood to mean that a bishop may turn to a sole judge only when it is impossible to constitute a college, for as long as the impossibility exists. Otherwise, the permissions would not be in conformity with the law. Of the 46 bishops' conferences whose legislation has been published by Martín de Agar,[3] sixteen have granted this permission. (The regulations of the CBI regarding this matter are unclear and apparently contradictory[4]).

Permission of the bishops' conference can refer only to the trial of first instance. The sole judge must be a cleric (deacon, priest or bishop: cf. cc. 266 § 1 and 1009 § 1), not a layperson (see commentary on c. 1421: no. 3, b).

d) *Collaborators of a sole judge who acts in place of a collegiate tribunal* (§ 4)

According to § 4 and assuming the appropriate permission, the sole judge entrusted with the judgment in a case reserved by law to a college of three judges not only *can* choose two assessors (as is generally affirmed in c. 1424 with respect to the sole judge), but, whenever possible, *should* choose an assessor (he may choose two, not more: cf. c. 1424) and an auditor. With respect to the assessor, see commentary on c. 1424. With respect to the auditor, see commentary on c. 1428.

2. *Assignment of the cases* (§ 3)

The judicial vicar has the responsibility to assign cases to the judges of a tribunal. If a tribunal must handle a case, the judicial vicar should designate its presiding judge (cf. c. 1426 § 2) and its other two judge saccording to a pre-established order. The pre-established order should be followed taking into account such particular circumstances as whether the judges in a tribunal work full-time or part-time and whether the chair may be established according to c. 1426 § 2, etc.). The order is to ensure the impartiality and integrity of the tribunal and to avoid suspicion. The bishop is the only person who can change such arrangements, not the judicial vicar.

The parties are to be notified of the names of the judges, so they may object to them in accord with c. 1449 §§ 1–2.

3. J.T. MARTÍN DE AGAR, *Legislazione delle Conferenze Episcopali complementare al C.I.C.* (Milan 1990).
4. Ibid., p. 386.

3. *Substitution of judges* (§ 5)

The *CIC* establishes that the judges, once they have been appointed, may be replaced by the judicial vicar only for *the gravest of reasons*. This is the only place in book VII where the *gravest of reason* standard is required. To accomplish or omit other actions in book VII, the legislator only requires *gravis causa* (cc. 1422, 1487, 1508 § 2, 1514, 1529, 1532, 1600 § 1,2°, 1603 § 2, 1736 § 2, 1737 § 3) or *iusta causa* (cc. 1429, 1436 § 2, 1465 § 2, 1469 § 2, 1482 § 2, 1555, 1650 § 2, 1668 § 2, 1698 § 2, 1704 § 1). Obviously, *the gravest of reasons* is a higher standard than *iusta causa* and *gravis causa*. Therefore, Paragraph 5 demonstrates the gravity the legislator wanted to attach to the reason for substituting the judge.

It has not been specifically defined what the gravest of reasons are, but examples might include the death of a judge, the accepted objection of a judge according to c. 1449 § 2, a penalty imposed upon a judge that would prevent him from continuing to exercise his duties (cf. cc. 1331 § 1,3°, 1333 § 1,2°–3°, 1336 § 1,2°–5°), the loss of the office of judge (cf. cc. 184–196), or a lasting illness or other circumstance that would prevent a judge from continuing to exercise his duties. The reason must be given in the substitution decree (according to Lüdicke, for validity[5]). All parties in the controversy must be notified of the substitution decree. The defender of the bond and the promoter of justice must also be notified if they are participating in the process, so that they might have the opportunity to file an exception against the judge in accordance with c. 1449 §§ 1–2.

Paragraph 5, like § 3, refers not only to collegiate judges but also to the sole judge.[6]

5. K. LÜDICKE, in *Münsterischer Kommentar zum Codex Iuris Canonici* (Essen seit 1985) (Loseblattwerk), Stand: 22.Erg.-Lfg. November 1993, 1425, 12.

6. For another opinion, cf. K. LÜDICKE, ibid., 1425,2.

1426 **§ 1. Tribunal collegiale collegialiter procedere debet et per maiorem suffragiorum partem sententias ferre.**

§ 2. Eidem praeesse debet, quatenus fieri potest, Vicarius iudicialis vel Vicarius iudicialis adiunctus.

§ 1. A collegiate tribunal must proceed in a collegiate fashion and give its judgement by majority vote.

§ 2. As far as possible, the judicial Vicar or an associate judicial Vicar must preside over the collegiate tribunal.

SOURCES: § 1: c. 1577 § 1; NSRR 139; *PrM* 14 § 1
§ 2: c. 1577 § 2; *PrM* 14 § 2

CROSS REFERENCES: cc. 1425 § 3, 1428 § 1, 1429, 1449 § 4, 1505 § 1, 1507 § 1, 1590 § 2, 1609 §§ 1–3, 1677 §§ 1, 2 et 4

COMMENTARY

Zenon Grocholewski

1. *Procedure of a collegiate tribunal* (§ 1)

The collegiate tribunal should proceed in a collegial fashion (*collegialiter*), means that all of the judges should meet and make their decisions by absolute majority vote. Therefore, in this canon (as in c. 1441), *collegialiter* has a meaning different from its meaning in several other canons. Other norms may provide that all members of the tribunal need not be present and that a decision can be adopted, not only by an absolute majority vote, but also in another way (cf. cc. 119, 127 § 1, 140 § 2, 443 § 5; 333 § 2, 337 §§ 2–3, 349). The meaning of *collegialiter* needs to be connected to the stipulations of c. 1609.

Obviously, the tribunal should proceed in this manner only in proceedings that demand a collegial treatment. Such proceedings include definitive sentences (c. 1609), the interlocutory sentences or decrees in incidental cases, (when the latter are resolved by the college; cc. 1589–1590), the referral of an incidental question to the auditor or the presiding judge (c. 1590 § 2), the revocation or reform of the interlocutory sentences or decrees given by the college (c. 1591), the resolution of the recourse against the rejection of petition by the presiding judge (c. 1505 § 4), the decision concerning c. 1610 § 3, the definition of the plaint of nullity (cf. cc. 1624–1625; cf. also c. 1441), or the petition for *restitutio in integrum* (cf. c. 1646 §§ 1–2; cf. also c. 1441) against a sentence issued by a college

(notwithstanding c. 1627 and in connection to c. 1657). In effect, the presiding judge of the college (§ 2), the relator (cf. c. 1429), and the auditor (cf. c. 1428) may perform many acts.

2. *President of the collegiate tribunal* (§ 2)

The judicial vicar or the associate judicial vicar "must preside over the college tribunal". Thus, entrusting the presidential function to another judge of the college is an exception, justified only when it is impossible to act in another way. In any event, the presidential function may not be entrusted to a layperson (see commentary on c. 1421, no. 5).

The *CIC* clearly establishes the responsibilities of the presiding judge. Responsibilities include appointing the auditor (c. 1428 § 1; in cases of marriage nullity, the relator may also make this appointment: c. 1677 § 4), appointing the relator (c. 1429), making decisions concerning the objection of ministers who are not judges of the tribunal (c. 1449 § 4), admitting or rejecting the petition (c. 1505 § 1), summoning the respondent, summoning the promoter of justice and the defender of the bond if they care participating in the case, convoking the promoter of justice and the defender of the bond for a concordance regarding the *dubium* (c. 1507 § 1, along with c. 1433; in cases of marriage nullity this function may be entrusted to the relator: c. 1677 §§ 1–2), deciding incidental questions the college entrusts to the presiding judge by means of a decree (c. 1590 § 2), convoking the judges for the definition of a case, and chairing the discussion (c. 1609 §§ 1 and 3).

The presiding judge also must perform actions that the *CIC* attributes to the judge. Such actions include the appointment of an advocate (c. 1481), the admission of a procurator without presentation of a mandate (c. 1484 § 2), the definition of the terms of the controversy (c. 1513 § 1; in cases of marriage nullity this task may be given to the relator: c. 1677 § 2), decisions covered by c. 1589 concerning incidental questions (by analogy with c. 1505 § 1), the declaration of absence of the trial of one of the parties (c. 1529 § 1), the trial of the acts and other decisions detailed in c. 1598, the trial of the decree of conclusion of a case (c. 1599 § 2), the determination of time periods for pleadings and observations (c. 1601), the permission to print the documents (c. 1602 § 2), and the determination of time for defense (c. 1603 §§ 1–2). Perhaps many of these actions may be assumed by the relator (c. 1429), but there is no clear disposition in this regard.

1427 **§ 1. Si controversia sit inter religiosos vel domos eiusdem instituti religiosi clericalis iuris pontificii, iudex primae instantiae, nisi aliud in constitutionibus caveatur, est Superior provincialis, aut, si monasterium sit sui iuris, Abbas localis.**

§ 2. Salvo diverso constitutionum praescripto, si res contentiosa agatur inter duas provincias, in prima instantia iudicabit per se ipse vel per delegatum supremus Moderator; si inter duo monasteria, Abbas superior congregationis monasticae.

§ 3. Si demum controversia enascatur inter religiosas personas physicas vel iuridicas diversorum institutorum religiosorum, aut etiam eiusdem instituti clericalis iuris dioecesani vel laicalis, aut inter personam religiosam et clericum saecularem vel laicum vel personam iuridicam non religiosam, iudicat in prima instantia tribunal dioecesanum.

§ 1. If there is a controversy between religious or houses of the same clerical religious institute of pontifical right, the judge at first instance, unless the constitutions provide otherwise, is the provincial Superior or, if an autonomous monastery is concerned, the local Abbot.

§ 2. Without prejudice to a different provision in the constitutions, when a contentious matter arises between two provinces, the supreme Moderator, either personally or through a delegate, will be the judge at first instance. If the controversy is between two monasteries, the Abbot superior of the monastic congregation will be the judge.

§ 3. Finally, if a controversy arises between physical or juridical persons of different religious institutes or even of the same clerical institute of diocesan right or of the same lay institute, or between a religious person and a secular cleric or a lay person or a non–religious juridical person, it is the diocesan tribunal which judges at first instance.

SOURCES: § 1: c. 1579 § 1; *CAd* I, 13
§ 2: c. 1579 § 2
§ 3: c. 1579 § 3

CROSS REFERENCES: cc. 131,3°, 134 § 1, 588 § 2, 589, 596 § 2, 607 § 2, 613, 620–622, 732, 734, 1438,3°

COMMENTARY

Zenon Grocholewski

1. *Power of jurisdiction of religious institutes*

Following a long doctrinal and legal evolution,[1] the *CIC* recognized that all clerical (cf. c. 588 § 2) religious institutes (cf. c. 607 § 2) of pontifical right (cf. c. 589) have authentic power of jurisdiction over their members (cc. 134 § 1, 596 § 2). Therefore, (cf. cc. 129 § 1 and 135 § 1), they exercise judicial power (cc. 1427 §§ 1–2, 1438,3°). In contrast, neither lay religious institutes (cf. c. 588 § 3) nor clerical religious institutes of diocesan right (cf. c. 589) have this power.

The power of jurisdiction in clerical religious institutes of pontifical right is held by the major superiors (cc. 134 § 1, 596 § 2). According to c. 620, this includes those who govern, *a)* the entire institute, called supreme moderators (cf. c. 622) *b)* a province (cf. c. 621), *c)* part of an institute (equivalent in law to a province), *d)* a house *sui iuris*, normally called abbots or priors (cf. c. 613), and *e)* their respective vicars.

In addition, c. 620 includes the abbot primate of a monastic congregation and the abbot superior of a monastic congregation, but not his vicars. Since power over such monastic confederations or congregations is determined by the constitutions, c. 620 states that such abbots do not have the all the power that the universal law gives to major superiors. In any event, *CIC* explicitly recognizes the judicial power of the abbot superior (c. 1438, 3°).

All provisions regarding the power of jurisdiction of religious institutes of pontifical right and the titleholders of this power also apply to societies of apostolic life (cc. 731–746), when such societies are clerical institutes of pontifical right (cf. cc. 134 § 1, 732, inasmuch as it refers to c. 596 § 2; and c. 734, inasmuch as it refers to c. 620). However, these provisions do not apply to the secular institutes governed according to cc. 710–730.

2. *Religious tribunals of the first grade*

In reality, *CIC* does not deal directly with tribunals of clerical religious institutes of pontifical right. Rather, it limits itself to indicating the titleholders of judicial power for controversies that may arise within those

1. Cf. X. OCHOA, "Potestas 'iudicialis' apud Congregationes clericales iuris pontificii," in *Commentarium pro Religiosis* 61 (1980), pp. 297–310; 62 (1981), pp. 3–21, 97–110; also in *Opus iustitiae pax* (Vatican City 1990), pp. 83–112.

institutes or societies. This allows for the establishment of tribunals in a stable manner or *ad casum*. The organization of these tribunals belongs to proper law, specifically to the religious institutes' constitutions.[2] In this regard, it may be useful to consult the study of X. Ochoa concerning the nature and organization of religious tribunals,[3] although it was written before the promulgation of the *CIC*.

In any event, decisions concerning the competencies in §§ 1–2 are valid only to the extent that the religious institutes' constitutions do not provide otherwise. Controversies contemplated in §§ 1–2 ought to be deferred to diocesan tribunals according to the ordinary norms of competency, except cases of exempted institutes or societies (cf. cc. 591 and 732, which refers to c. 591).

This canon deals with competency both for contentious and penal cases.[4]

It should be noted that § 1 does not speak only of controversies between religious or religious houses appearing in the same province. Therefore, when the controversy has to do with religious or the housing of different provinces, cc. 1407–1415 determines whether the provincial superior is competent.

The delegated judges are expressly mentioned only in relation to the supreme moderator (§ 2), but it appears obligatory that the rest of the major superiors may constitute a tribunal *ad casum* (cf. c. 131 § 1).

Regarding the appeal tribunal, cf. c. 1438,3°.

3. *Non-religious tribunals of the first grade for religious* (§ 3)

The prescriptions of § 3 concerning cases involving religious members that may not be judged before religious tribunals appear superfluous, since those prescriptions are a mere consequence of the principle that only clerical religious institutes (and clerical SALs) have judicial power over their own members. Consequently, it is evident that other cases they must be filed before the competent diocesan tribunal.

2. M.J. ARROBA CONDE, *Diritto processuale canonico* (Rome 1993), p. 136.

3. X. OCHOA, "Ordinatio tribunalium religiosorum iuxta vigentem disciplinam," in *Commentarium pro Religiosis* 63 (1982), pp. 3–21; 64 (1983), pp. 124–141; also in *Opus iustitiae pax*, cit., pp. 161–186.

4. In a different sense, K. LÜDICKE, in *Münsterischer Kommentar zum Codex Iuris Canonici* (Essen seit 1985) (Loseblattwerk), Stand: October 22, 1993, 1427, 5.

ART. 2
De auditoribus et relatoribus

ART. 2
Auditors and Relators

1428 **§ 1. Iudex vel tribunalis collegialis praeses possunt auditorem designare ad causae instructionem peragendam, eum seligentes aut ex tribunalis iudicibus aut ex personis ab Episcopo ad hoc munus approbatis.**

§ 2. Episcopus potest ad auditoris munus approbare clericos vel laicos, qui bonis moribus, prudentia et doctrina fulgeant.

§ 3. Auditoris est, secundum iudicis mandatum, probationes tantum colligere easque collectas iudici tradere; potest autem, nisi iudicis mandatum obstet, interim decidere quae et quomodo probationes colligendae sint, si forte de hac re quaestio oriatur, dum ipse munus suum exercet.

§ 1. The judge or, in the case of a collegiate tribunal, the presiding judge, can designate an auditor to instruct the case. The auditor may be chosen from the tribunal judges, or from persons approved by the Bishop for this office.

§ 2. The Bishop can approve clerics or lay persons for the role of auditor. They are to be persons conspicuous for their good conduct, prudence and learning.

§ 3. The task of the auditor is solely to gather the proofs in accordance with the judge's commission and, when gathered, to submit them to the judge. Unless the judge determines otherwise, however, an auditor can in the meantime decide what proofs are to be collected and the manner of their collection, should any question arise about these matters while the auditor is carrying out his or her role.

SOURCES: § 1: c. 1580; *PrM* 23 § 1; *CM* VI, VII
§ 2: Secr. St. Rescr., 1 oct. 1974
§ 3: c. 1582; *PrM* 24

CROSS REFERENCES: cc. 149 § 1, 1418, 1425 § 4, 1448, 1449 § 4, 1561, 1590 § 2, 1677 § 4

COMMENTARY

Zenon Grocholewski

1. *The appointment of the auditor* (§ 1)

The auditor is appointed by the judge, in cases on which a sole judge rules, or by the presiding judge, in cases on a college of judges rules. In cases of marriage nullity, the presiding judge may entrust this appointment to the relator.

The auditor is not a necessary appointment, since § 1 does not say *debent,* but *possunt.* The sole judge or presiding judge (or, in cases of marriage nullity, the person charged by the judge with the assignment foreseen in c. 1677 § 4) may instruct the case themselves (see the commentary on c. 1429: no. 2). The only cases in which the law, to the extent possible, imposes the appointment of an auditor are those cases which, even though reserved by law to a collegial judge, are judged by a sole judge in accordance with c. 1425 § 4.

Paragraph 1 appears to speak of an auditor undertaking the whole instruction of the case, but an auditor also may undertake partial instruction of the case.

2. *Who can be chosen as an auditor* (§ 2)

— In a college of judges, it is beneficial for the auditor to be appointed from among the judges of the college. In fact, this is the normal practice for most tribunals. Frequently, the same person holds the task of auditor and relator, so the person who must present the case at the meeting of judges has had direct contact with the sources for the evidence.

— In both the case of a sole judge and the case of a collegial judge, a person approved by the diocesan bishop may receive the role of auditor. The bishop can appoint clerics and lay people who are in communion with the Church and are distinguished for good conduct, prudence, and doctrine(c. 149 § 1). This is not the same demanding standard of good repute (*integra fama*) required for judges (cc. 1420 § 4, 1421 § 3), defenders of the bond, and promoters of justice (c. 1435), nor does it demand the specific academic title required of some tribunal officers (cc. 1420 § 4, 1421 § 3, 1435). Nevertheless, aside from the good conduct required for honesty in the development of the auditor's instruction, the demands for prudence and doctrine (i. e., intellectual capacity and certain knowledge) must be taken seriously to guarantee that the instruction proceed in a regular and efficacious manner.

The appointment of the advocate or procurator of the party to instruct the case or collect certain proofs—something that regrettably has come to pass in certain local Churches[1]—is not only contrary to the law, it also completely undermines the necessary dialectic of process.

In addition to the auditor, the judge may ask for assistance from another tribunal to collect specific proofs (c. 1418). The judge may also delegate this task to someone else (cf. cc. 135 § 3 and 1561).

3. *The rejection of the auditor*

The auditor may be objected to. In this regard, cf. cc. 1448, 1449 § 4.

4. *The task and the power of the auditor* (§ 3)

The specific task of the auditor is to collect the proofs and present them to the judge, sole or collegial. In carrying out this task, the auditor is subject to the dispositions of the law, especially cc. 1526–1587, which govern the method to carry out the means of proofs. The auditor is also subject to the mandate of the judge.

The *CIC* also gives the auditor a certain power of decision. Unless forbidden by the mandate of the judge, the auditor may decide which proofs may be collected and the manner of their collection. In any event, § 3 points out that the auditor can decide "interim" (in the meantime). Without prejudice to this decision, the judge can make the proofs be subsequently completed, exclude some of them, or make opportune inquiries to better evaluate the collected proofs. Decisions of the auditor may be brought before the judge when there is an appeal.

With regard to the decision-making power of the auditor, c. 1590 § 2 allows the judge to entrust to the auditor, by means of a decree, an incidental question arising during the collection of the proofs (cf. c. 1591).

1. Cf. F. DANEELS, "De tutela iurium subiectivorum: quaestiones quaedam quoad administrationem iustitiae in Ecclesia," in *Ius in vita et in missione Ecclesiae (Acta Symposii Internationalis Iuris Canonici)* (Vatican City 1994), pp. 187–188. In addition to the positions cited in that work, cf., in the Apostolic Signatura, among others, prot. nos.: 21.800/90 VT (*Letter*, November 30, 1990, no. 4), 21.858/90 VT (*decr.*, October 10, 1991, no. 3a), 22.538/91 VT (*decr.*, April 10, 1992, no. 3c).

1429 Tribunalis collegialis praeses debet unum ex iudicibus collegii ponentem seu relatorem designare, qui in coetu iudicum de causa referat et sententias in scriptis redigat; in ipsius locum idem praeses alium ex iusta causa substituere potest.

The presiding judge of a collegiate tribunal is to designate one of the judges of the college as *ponens* or *relator.* This person is to present the case at the meeting of the judges and set out the judgement in writing. For a just reason the presiding judge can substitute another in the place of the *ponens.*

SOURCES: c. 1584; *PrM* 22 § 1

CROSS REFERENCES: cc. 1421 § 2, 1425 § 1, 1609 § 3, 1610 §§ 2–3, 1677 §§ 1, 2 et 4

COMMENTARY

Zenon Grocholewski

1. The *ponens* or *relator* is a position that only exists in *collegiate tribunals.*

2. The *designation* of the *ponens* in the collegiate tribunals is obligatory. It has to be made by the presiding judge. The *ponens* may be only one of the judges of a college. The presiding judge may designate himself as *ponens*. The functions of *ponens* and auditor may be assigned to the same person. As a matter of fact, quite frequently this is the praxis of ecclesiastical tribunals where the presiding judge takes on the two functions of *ponens* and auditor. Nothing stands in the way of this cumulation. Under certain circumstances, it appears to be the best solution.

Regarding the possibility of appointing a lay judge to be *ponens,* see commentary on c. 1421: no. 6.

3. The *specific tasks* of the *ponens* are to present the case at the meeting of the judges, to be the first to offer conclusions (cf. also c. 1609 § 3), and to draw up the judgment (cf. also c. 1610 § 2).

In cases of marriage nullity, the presiding judge may entrust to the *ponens* the summons of the respondent, the ex officio establishment of the *dubium* or the *dubia* by means of decree, notification of the *dubium* or the *dubia* to the parties, and the opening of the instructory phase of the case by means of decree (c. 1677 §§ 1, 2 and 4).

See also commentary on c. 1426: no. 2 *in fine*.

4. A presiding judge may proceed with the substitution of a *ponens* for a just reason. A grave or extremely grave reason is not required (see commentary to c. 1425: no. 3). A just reason might be that, during the meeting called to decide this issue, the *ponens* finds himself in the minority and has difficulty explaining the reasons for the decision. Other just reasons might be an excessive caseload, some impediment to the *ponens* drawing up the judgment in a reasonable period of time (cf. c. 1610 § 3), or finding during the deliberating session that another judge, by contributing valid arguments the college accepts, is particularly expert in the subject at issue in the case which and therefore better qualified to draw up the judgment, etc.

ART. 3
De promotore iustitiae, vinculi defensore et notario

ART. 3
The Promotor of Justice, the Defender of the Bond and the Notary

1430 **Ad causas contentiosas, in quibus bonum publicum in discrimen vocari potest, et ad causas poenales constituantur in dioecesi promotor iustitiae, qui officio tenetur providendi bono publico.**

A promotor of justice is to be appointed in the diocese for penal cases, and for contentious cases in which the public good may be at stake. The promotor is bound by office to safeguard the public good.

SOURCES: c. 1586; *NSRR* 24 § 1; *PrM* 16 § 1

CROSS REFERENCES: cc. 145, 469–470, 1423, 1431, 1433–1436, 1435, 1445 § 3,1°, 1447–1448, 1449 § 4, 1451, 1454–1455, 1457, 1674,2°, 1678, 1692 § 2, 1696, 1715 § 1, 1721 § 1, 1728 § 1, 1752

COMMENTARY

Carmelo de Diego-Lora

1. The protection of the public good in the canonical process is attributed to the promoter of justice. Thus, if it becomes evident that the public good is at stake in a contentious case, the promoter of justice should be present and act to promote everything that favors the public good. The promoter of justice also should oppose all that is damaging to the public good or make note of when it is not kept in mind.

In the same way, the promoter of justice must take part in the penal process according to the prescriptions of the canon. It should be noted that penal cases are not conceivable without a petition of accusation from

the promoter of justice (c. 1721 § 1). It should not be forgotten that penal law imposes penalties on those who have committed crimes. All penalties consist of a privation of some juridical good, together with other requisites, as defined in c. 2215 *CIC*/1917. Juridical good pertains to the juridical patrimony of the faithful. According to the Vatican Council II, the pastoral character of the penalty prevails over the vindictive character. Thus, all penalties must take into account, as their ultimate object, the eternal salvation of the offender and, consequently, his or her spiritual conversion on earth. Their juridical nature, however, obliges them to consider, as their immediate object, the defense of the fundamental juridical interests of the Church, which are intended also for the alleged offender."[1]

Therefore, contentious cases involve the presence of litigious objects, formalized in the petition, that bear relation to juridical situations in which the public good of the Church is questioned in the proper contention of the proceeding. The cases are contentious because they somehow affect the salvation of souls, *quae in Ecclesia suprema lex esse debet*, or because they address a penal decision, through which good of doubtless public relevance in the Church is protected, as emphasized by the types of crimes defined in part II of book VI. These fundamental goods of which the guilty party is deprived as a consequence of the imposition of the penalty constitute part of a juridical patrimony that cannot be renounced, and over which there is no authorization of the faithful to freely dispose of them (c. 1715 § 1). Thus, in the penal process, the canons concerning judicial procedures in general, the canons concerning the ordinary contentious process, and the special norms *causis quae ad bonum publicum spectant* (c. 1728 § 1) must always be observed.

The antecedents of the canon are not in Roman law, which considers popular action in criminal cases and does not distinguish between public and private rights appear in contentious cases. The most remote antecedents are found in France in the XIII century. As the French royalty established solicitors who would defend its property and rights and would prosecute those who committed crimes, so the bishops created the office of the promoter to prosecute criminals and to protect orphans, widows, and abandoned persons. In fact, according to Fournier, the promoters of the bishops probably preceded the solicitors of the French monarchs. Nonetheless, according to Roberti,[2] the promoter of justice appears for the first time under Innocent III (1198–1216), although not yet called by this name, with the introduction of the process of inquisition, which prohibited judges from acting as inquisitor. The term promoter, referring to the inquisitor, appears at the time of Gregory IX (1227–1234). In the middle of the XIII century it became a stable office. Benedict XIII (June 12, 1724), upon creating the office of procurator general for the Roman Curia,

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1. Cf. J. ARIAS, commentary on c. 1312, in *Pamplona Com.*
2. Cf. F. ROBERTI, *De processibus*, I (Vatican City 1956), pp. 291–294.

charged this office with promoting appeals in criminal cases of all curias in Rome without a procurator. Finally, in the Instruction of the S. Congr. of bishops and Regulars of June 11, 1880, each curia was ordered to have a fiscal procurator for justice and protection of the law. The office of promoter of justice remained somewhat indefinite, but primarily had the functions of defense of the treasury and prosecution of crimes. Promoters of justice were required to participate in criminal proceedings under threat of nullity of the sentence. This office of promoter of justice was also extended to contentious cases when dealing with the freedom of the Church, pious legacies, ecclesiastical goods, *etc.*

2. The public good to which c. 1430 refers is an indeterminate juridical concept. Canon law generally accepts that it is present in all penal cases and in specific contentious cases. For example, it is present when c. 1674,2° attributes to the promoter of justice the active authority to impugn the validity of marriage when its nullity has been made public, and it is neither possible nor convenient to validate the marriage. It is also present in c. 1696, which calls for the attendance of the promoter of justice in cases of separation of spouses. Nonetheless, except for the existence of a specific prescription in the law, determination in each case of the existence of the public good falls to the diocesan bishop (c. 1431). Such determination occurs without prejudice to the fact that, on occasion, the proper judicial vicar or tribunal may decide, collegially or by decree of the president. It is evident that the promoter of justice must intervene due to the implication of the public good in a case. In the event of such implication, notice is given of what has already taken place, so the promoter may exercise the proper function of the public office later in the proceeding.

The *CIC*/1917 granted certain faculties to the promoter of justice in contentious cases. For example, c. 1688 § 2 of the *CIC*/1917 addressed the action of restitution *in integrum* in favor of minors and those with the rights of minors (in c. 100 § 3 of the *CIC*/1917, moral persons are compared to minors). These canonical norms have completely disappeared in the current law. The *Provida Mater* 16 § 1 prescribes the obligatory intervention of the promoter of justice when addressing the defense of procedural law. Protection of procedural law should be exercised if decreed by the bishop or the college of judges, by the office or instance of the same promoter of justice, by the defender of the bond, or by the parties. Nonetheless, protection of the procedural law as it pertains to the public good does not have backing in the *CIC*/1917. According to c. 1856, the *attempt* during the arguments of the issue would not require the intervention of the promoter unless he had already intervened in the case. In the same way, another recourse also conceived to protect procedural law. The complaint of nullity of the sentence, according to c. 1891 § 1, could be interposed by the promoter of justice only if he had already intervened in the case, but not for the purpose of defense of the procedural law. The necessary presence of the promoter for reasons of procedural law is seen only in c. 1709 § 3 *CIC*/1917. There the petition was not admitted by the judicial organ,

against whose decree would fall recourse before the superior tribunal. The superior tribunal would have to resolve the issue by hearing first the promoter of justice and others. This norm omits the current c. 1505 § 4.

All the prior references to the promoter of justice in contentious cases, except where the promoter is already in the process as a public party, have been avoided in current canon law, except in cc. 1674,2° and 1696. In the remaining hypotheses, the determination of the concept of "public good" will depend on how c. 1431 § 1 is generally laid out. Therefore, there are specific assignations which assess whether the public good is effectively at stake in a contentious case. Canon 1431 § 1 does not have an antecedent in the *CIC*/1917.

3. The role of the promoter of justice corresponds in a certain manner to the public ministry of other secular legislation.[3] However, some characteristics are different., The role of the promoter of justice is more limited and works within the canonical process only, not within other juridical environments in defense of the public administration. The role of the promoter of justice does not have a function over the tribunals of justice. That function is reserved in c. 1445 § 3,1° to the tribunal of the Apostolic Signatura.[4] Finally, the promoter of justice does not represent administrative authority in the process; rather, he acts as a litigant whose exclusive mission is of the protection of the public good as understood in the Church.

The promoter of justice is not involved in the judicial curias, especially when the judicial curias are dedicated to the resolution of cases of nullity of marriage, not the separation of spouses. This is because the canonical sentences of the latter are commonly carried out before civil judges (cf. c. 1692 § 2). Nonetheless, c. 1430 expressly requires the establishment in each diocese of the ecclesiastical office of promoter of justice. Given the legal-canonical preparation that c. 1435 requires of promoters of justice, and given the broad conception offered in cc. 469 and 470, bishops in many dioceses also confer other legal functions within the diocesan curia upon promoters of justice. These are often functions of juridical assistance related to the proper acts and decisions of the active administration, including functions that can have repercussions or effects in the civil courts. Nonetheless, it must be affirmed that functions conferred by the diocesan bishop to the promoter of justice are not carried out as a promoter and that the scope of the ecclesiastical office does not exceed the functions attributed to it in c. 1430.

4. Although this canon expressly states of the promoter of justice, *qui officio tenetur providendi bono publico*, these words are not to be understood in isolation from the rest of the terms of the canon. Rather they should be understood with the limitations that the same precept

3. Cf. ibid., pp. 296–298.
4. Cf. *PB*, 124,1°.

establishes when it determines the final cause of the office and the context in which the activity of the promoter of justice is produced: *ad causas contenciosas in quibus bonum publicum in discrimen vocari potest, et ad causas poenales*. Consequently, the public good of the Church is not protected whenever it appears to be implicated, but only when the promoter intervenes in the canonical process to protect the public good.

In the same way, the canon stresses that it is an ecclesiastical office, and as such should possess the stability prescribed in c. 145 § 1 (which does not contradict what is set out in c. 1436 § 2.) The obligations and rights of this ecclesiastical office are determined in proper law, especially c. 145 § 2 in relation to cc. 1430, 1431, 1433–1436, 1674,2°, 1678, 1696. They are also determined in proper law by canons expressly recognizing the promoter's rights, duties, and procedural responsibilities and by canons derived from proper law in relation to the promoter's position as a procedural party.

The promoter of justice is an office to be exercised for the institutional purpose of achieving justice through knowledge of the truth. Thus, the office is to be carried out before and within the diocesan tribunal. In circumstances where a number of bishops create a common tribunal in place of individual diocesan tribunals, a promoter of justice should be appointed to the common tribunal. In the same way, the tribunal of the Roman Rota must have its own promoter of justice.[5]

The promoter is not a member of the tribunal (cc. 1505 § 1, 1513, 1611). However, the office is exercised in and before the tribunal, as a public party. The promoter carries out the functions of a party: to petition, allege, prove, contest, and appeal, always and only in defense of the public good.

Like the judge, the promoter of justice remains subject to limitations in relation to the same case in another instance. Like the judge, the promoter can be challenged (cc. 1448, 1449 § 4, 1451). The promoter cannot later serve as judge or assessor in the case (c. 1447). The promoter must take an oath to exercise the office properly and faithfully (c. 1454). Responsibilities can be required, even penal responsibilities, if promoters infringe on the prohibitions prescribed for the judges and ministers of the tribunal in cc. 1455–1457.

Its juridical nature as a party does not exempt the promoter from the public responsibilities of the ecclesiastical office . Thus, for the purpose of such public responsibilities, the promoter remains situated at the same level as the ministers of the tribunal.

5. Cf. *NSRR* (1994), art. 24; in the same way cf. cc. 1063 and 1094 *CCEO*.

1431 **§ 1. In causis contentiosis, Episcopi dioecesani est iudicare utrum bonum publicum in discrimen vocari possit necne, nisi interventus promotoris iustitiae lege praecipiatur vel ex natura rei evidenter necessarius sit.**

§ 2. Si in praecedenti instantia intervenerit promotor iustitiae, in ulteriore gradu huius interventus praesumitur necessarius.

§ 1. In contentious cases it is for the diocesan Bishop to decide whether the public good is at stake or not, unless the law prescribes the intervention of the promotor of justice, or this is clearly necessary from the nature of things.

§ 2. If the promotor of justice has intervened at an earlier instance of a trial, this intervention is presumed to be necessary at a subsequent instance.

SOURCES: § 1: c. 1586; *PrM* 16 § 1; 38 § 2
§ 2: Signatura 15 mar. 1921 (*AAS* 13 [1921] 269); *NSRR* 27 § 2

CROSS REFERENCES: cc. 116–118, 123, 305, 321, 323–324, 325 § 1, 326 § 1, 381, 387, 391 § 1, 392, 394 § 1, 1430, 1432–1433, 1445 § 2, 1470, 1505, 1507, 1596–1597, 1649,3°

COMMENTARY

Carmelo De Diego-Lora

1. The first paragraph of c. 1431 determines the canonical system for judging whether the public good is at stake in a particular case. Undoubtedly, if the law prescribes the intervention of a promoter of justice, such as in penal cases and separation or annulment of marriage cases (see commentary on c. 1430), there is no need to judge whether the public good is at stake. But, according to c. 1431, when this is not the situation, judgment regarding whether the public good is at stake falls to the diocesan bishop.

The concept of public good is neither defined nor described by canon law. The concept exists when the salvation of souls is at stake in a case and when the sentence sought deprives one or more of the faithful of fundamental juridical good. Similarly, the concept of public good should be considered when the authority of the Church may be diminished or when sacred ministers may be harmed in the exercise of their duties. The

concept might also exist when juridical persons are denied the rights are recognized in the *CIC* or expressly sanctioned in its statutes. Nonetheless, not all of these rights have equal consideration or transcendence and the treatment of juridical persons is not the same in every case. Thus, for public juridical persons in the name of the Church seeking the public good (cf. c. 116), the legislation emphasizes the concept of the public good. On the contrary, for private juridical persons, the proper statutes have a specific weight that denotes the peculiarity (cf. cc. 118, 123, 321) and private autonomy (cf. cc. 323, 324) of private juridical persons. This autonomy is conditioned on a number of acts: acquisition of approval of the statutes by the competent authority for the juridical person (c. 116 § 2 *in fine*), submission to the supervision and governance of the competent authority (cc. 323 and 305), and verification by the same authority that the property of the association is employed for the purpose recognized in the statutes (c. 325 § 1). Apart from these, the autonomy's existence remains conditioned on the decision of the competent authority. The authority may suppress the autonomy it if its activity gives rise to grave harm to ecclesiastical teaching or discipline, or if it is a scandal to the faithful (cf. c. 326 § 1).

There are concepts in which the public good of the Church can be understood as implied. Questions may arise regarding juridical persons whose procedural goals affect the public good. Such questions might involve public persons fulfilling their goals in the name of the Church, integrity of the faith, integrity of customs, abuses of ecclesiastical discipline, submission to the prescriptions of the legitimate authority, patrimonial conduct of public persons, dedication of property to the purposes recognized in the statutes of private persons, grave harm to ecclesiastical teachings and discipline in the exercise of activities, cause for scandal, *etc.* These questions involve repercussions for the faithful since they are intimately related to the good of souls. Questions may also arise regarding the conduct of the faithful or the activities of juridical persons that could be acceded to tribunals, at least hypothetically, and questions for which the diocesan bishop understands that the promoter of justice should intervene in the process. This is especially true in the fundamental exercise of the *tria munera*: govern, teach, and sanctify.

The first draft of this canon had these words added to the current text: *ut cum agatur de Ecclesiae libertate vel de minorum personarumque iuribus*. Nonetheless, in the session of the *coetus* of Consultors of April 8, 1978, it was agreed to eliminate them.[1] The elimination may have been done because the enumeration of cases was insufficient and could be perceived as limiting of other possible cases.

1. Cf. *Comm.* 10 (1978), p. 237.

2. The public nature of canon law has been supported by an important part of canonical doctrine. Nonetheless, the fact that the contrary can be supported in the small part of the canonical system that pertains to the private good of individuals does not prevent an understanding compatible with the strong public influence that is understood in canon law. Therefore, numerous hypotheses will exist that, if they transcend the process, would not necessitate the bishop to render a judgment regarding the stake of the public good in the process. Thus, § 1 was introduced in a new canon whereby to attribute such a judgment to the diocesan bishop. From the time such judgment is issued, the intervention of the promoter of justice becomes necessary, to the extent that if this intervention is lacking, the process becomes subject to the invalidity of the acts prescribed in c. 1433.

This attribution to the diocesan bishop is correct because, in each local church, the ordinary, proper, and immediate power required for the exercise of the pastoral function (c. 381) is attributed to the bishop, except for what corresponds to the supreme authority of the Church or to another legitimate authority. The responsibilities of promoting the holiness of the faithful and serving as the principal dispenser of the mysteries of God (c. 387) also fall to the bishop. It is up to the bishop to hold legislative, executive, and judicial power, in accordance with the law (c. 391 § 1). The bishop must also defend the unity of the universal Church in his diocese by demanding compliance with ecclesiastical laws and guarding against the introduction of abuses in ecclesiastical discipline, especially in the celebration of the sacraments and sacramentals, the worship of God and the saints, and the administration of ecclesiastical goods (c. 392). At the same time, the bishop should encourage the distinct forms of the apostolate (c. 394 § 1).

Therefore, the diocesan bishop has responsibilities that spread across a number of diverse functions, all intimately binding, in proportion with or dependent upon, the public good of the Church. This permits him to issue a determinate judgment for each process with security, supported by his authority and in the exercise of his ordinary power, regarding whether or not the public good is implicated in the litigious question. Such a determination will be in the form of a specific precept directed to the judge, the tribunal, or the promoter, for a specific action to be taken in the process, whether it is formulating an act of petition (c. 1504), defending the public good (c. 1507), or intervening as a third party (cc. 1596–1597).

3. The legislator did not want competence for the issuance of judgment regarding the implication of the public good of the Church in a specific process to pass to the titular of an ecclesiastical office other than the diocesan bishop in the local church. However, when this judgment must be made in a process that passes to the Roman Rota, procedural norms (*NSRR* 1994, art. 24 § 1) foresee that the Roman Rota must intervene in all penal issues as the accuser (art. 25 § 1). In effect, if law does not mandate the intervention, the chairman of the Roman Rota will issue judgment

regarding whether the litigious case pertains to the public good, primarily in reference to procedural laws.

Therefore, the office of promoter of justice, considered by the *CIC* as an office of each particular church, is an office of the justice courts. The promoter acts as a party in the procedure with the rights, duties, charges, and responsibilities derived from being a party, as well as with the public responsibilities of a person considered a minister of the court.

The motivating character of all the interventions of the promoter of justice of Roman Rota should be emphasized when they must be heard by the court due to its office, either when it urges, objects, or lodges a vote (cf. *NSRR* of 1994, art. 26). In the same way, the Roman Rota's opinion in all concessions or denials of gratuitous benefice should be considered. This precept can be reproduced by the bishop for his diocese based on c. 1649, 3°. The office of the adjunct, the promoter of justice has assigned in the Roman Rota by art. 6 § 1 of the procedural rules, could also have been assumed by the *CIC* in its time, mainly regarding a possible substitution (art. 28 *NSRR*). Although in the Roman court, the adjunct has a special attribution relative to the Eastern Catholic faithful (art. 7 § 3 *NSRR*). Hypothetically, the promoter of any tribunal of justice of the Church may assume all of the aspects peculiar to the promoter of justice of the Roman Rota.

There is also a promoter of justice among the singular offices of the Supreme Tribunal of the Apostolic Signatura (art. 8 *SNAS*). This character as a member of the tribunal justifies that the General Regulations of the Roman Curia (a. 4) at the functional level, considers it equivalent in law to the judges of the Roman Rota, like the defender of the bond. Its functions are to intervene in all criminal and contentious cases in which the public good enters into question. However, in addition, given the special public nature of any objection set forth against an act of the administrative authority, its intervention is required in these cases, as in other administrative controversies put before the Roman Pontiff or the Curia and in conflicts arising among them (cf. c. 1445 § 2 and *PB* 123 § 3). Such claims, which must be put before the *sectio altera*, require the intervention of the promoter of justice, according to art. 10 *SNAS*. These same norms, which have an *ad experimentum* value, prescribe for the *sectio altera* action of the promoter of justice in different moments of the special proceeding, as demonstrated in arts. 113, 115, 116, 120. Article 120, similar to art. 115, accentuates that the promoter's decisions are always *pro rei veritate*. On the other hand, on debating the antecedent of c. 1431, these terms were not accepted by the *coetus* of consultors.[2] Although the words *pro rei veritate* received special attention in the *Address* to the Roman Rota by Pius XII (see commentary on c. 1432), at present, all action by public parties must

2. Cf. ibid., p. 239.

proceed with the goal of stressing the truth of the litigious *res*. No other interest can interfere with the value of the truth of the facts. The judge must operate on this basis to pronounce the sentence in conformity with the law.

4. The second paragraph of c. 1431 considers the appeal of a definitive sentence, a decree, or an interlocutory sentence, if these can be appealed. In such cases, if the promoter of justice intervened in an earlier instance, the promoter must also be present in subsequent instances for the appeal to continue due to non-conforming sentences.

This precept is also a source of attribution by reason of the public good, although it is determined expressly by canon law. The canon justifies prolonging the functions of the promoter of justice in successive instances because it is presumed necessary. If the defense in the first degree of judicial knowledge required this presence by reason of the public good, it must be presumed that the public good continues to be at stake in subsequent instances. This concerns the presumption that the case would be *iuris et de iure*, although this type of presumption has not been welcomed by the *CIC*.

From another perspective, the unity of the canonical process affirmed by the conformity of sentences is evidenced in c. 1431 § 2. One must recall that when the last instances of knowledge and judicial decision produce a transfer to a superior court subject to a distinct episcopal jurisdiction, it would not be the same promoter of justice from the preceding instance who would go before the superior court, but rather the promoter named by the higher court.

In these cases, the figure of the office remains but the physical person who exercises the office changes. This indicates that opinions sustain the promotera promoter of justice in one instance cannot be completely reconciled, since each promoter will exercise his or her ecclesiastical office before the court with his or her own competence, illuminated by the law and the facts the promoter considers proven. It does not seem strange, given this consideration, that the procedural norms for the Roman Rota expressly state the following for penal cases in art. 25 § 3: *Si causa agatur ex appellatione a tribunale inferiori, iustitiae Promotor a cuestioni renunciare poterit, audito Ordinario.* In any instance, the promoter of justice cannot be impeded from carrying out what is indicated in art. 28 § 2 *NSRR* for penal cases. The promoter of justice can renounce the accusation if, considering the judgment of the ordinary, he considers the accusation lacking in basis. This norm is inspired by a general principle: no legal party can sustain a claim or opposition, if he or she is aware that it is lacking in basis.

1432 **Ad causas, in quibus agitur de nullitate sacrae ordinationis aut de nullitate vel solutione matrimonii, constituatur in dioecesi defensor vinculi, qui officio tenetur proponendi et exponendi omnia quae rationabiliter adduci possint adversus nullitatem vel solutionem.**

A defender of the bond is to be appointed in the diocese for cases which deal with the nullity of sacred ordination or the nullity or dissolution of marriage. The defender of the bond is bound by office to present and expound all that can reasonably be argued against the nullity or dissolution.

SOURCES: cc. 1586, 1968, 1969; *PrM* 15, 70–72; SCDS Litt., 15 ian. 1937; PIUS PP. XII, Alloc., 2 oct. 1944, 2 b (*AAS* 36 [1944] 284); IOANNES PAULUS PP. II, Alloc., 14 febr. 1980 (*AAS* 72 [1980] 172–178)

CROSS REFERENCES: cc. 1430, 1433–1436, 1637 § 1, 1628, 1674,2°, 1678 § 1, 1682, 1686–1688, 1699 § 1, 1701 § 1, 1705 § 1

COMMENTARY

Carmelo de Diego-Lora

1. The canon prescribes the need to appoint a defender of the bond in each diocese: *constituatur in dioecesi defensor vinculi*. The text is parallel to what c. 1430 says regarding the promoter of justice. In fact, *CIC*/1917 stressed this parallel by treating the necessity for both ecclesiastical offices in a single canon (c. 1586).

Canon 1432 states the specific procedures that require the presence of the defender of the bond; namely, those dealing with the nullity of sacred ordination or the nullity or dissolution of marriage. Nonetheless, in the canons regulating nullity of marriage, little mention is made of the defender of the bond, although c. 1678 recognizes his right, along with the legal representatives of the parties and the promoter of justice, to be present during the examination of the parties, witnesses, and experts and to inspect the judicial acts and the documentation produced by the parties. The canon does not elaborate on the reason that justifies the access of the defender of the bond to the evidence, but c. 1434 compares the role of defender of the bond, like the promoter of justice, with the juridical condition of a party in the process. In assuming this role in the process, by virtue of his ecclesiastical office, the action of the defender of the bond will be as a party, with the procedural benefits that are conceded not to private parties (c. 1678 § 2), but to their attorneys (c. 1678 § 1).

The defender of the bond intervenes in the first instance of the documentary process (c. 1686), just as in the appeal (c. 1688). In the proceeding for the dissolution of the conjugal bond, the defender of the bond must intervene (c. 1701 § 1). The bishop must transmit the acts to the Apostolic See, together with his opinion and the observations of the defender of the bond (c. 1705 § 1). Facing an appeal of the first sentence of nullity regulated by c. 1682 § 2, special recourse must be resolved by the appeal tribunal viewing the observations of the defender of the bond.

2. None of the previous canons describe the role of the defender of the bond in cases of nullity of sacred orders or nullity of marriage and dissolution of the conjugal bond. Nonetheless, c. 1432 describes the role where it states, "[he] is bound by office to present and expound all that can reasonably be argued against the nullity or dissolution." This means the defender of the bond acts in a juridical capacity of virtual opposition with respect to the request as a passive party in the process. The defender of the bond must be summoned in proceedings of nullity of marriage or of sacred ordination to be informed of the claim of nullity. The goal is that the defender of the bond be able to demonstrate, if it is reasonable, opposition to the claim of nullity. Thus, c. 1687 also indicates the duty to appeal the sentence put forth in the documentary process if it is prudent. In proceedings of dissolution of the conjugal bond, the attitude of the defender of the bond will always be in opposition of the dissolution, if there is sufficient reason to maintain such opposition.

In proceedings of nullity of marriage, the intervention of the promoter of justice is possible and takes on the posture of the plaintiff (c. 1674,2°). The defender of the bond always intervenes in such proceedings and, in addition, acts as a passive party. In all proceedings of nullity of marriage or of sacred orders, the defender of the bond must be present and must oppose the concession of the dispensation if such opposition is reasonable.

Consequently, in all proceedings of nullity of marriage, the defender of the bond is a necessary passive party, whether the plaintiff is the promoter of justice or one of the spouses. If the plaintiff is the promoter of justice, acting according to c. 1674,2°, the spouses and the defender of the bond must be summoned to the proceeding as passive parties. If only one spouse requests the nullity, the other spouse and the defender of the bond must be summoned. If both spouses are joint plaintiffs, the defender of the bond must be summoned to respond to the claim and to oppose it if reasonable. The litigious *res* is indivisible, and all those who agree to the request, whether they are public or private subjects, must be in the proceeding, as they will also be in the sentence.[1] In nullity of sacred orders, although there are no joint litigations and the promoter of justice is not

1. Cf. analogously c. 1637 § 2 about the joint litigation necessary for appeal.

legitimately *ad processum* to be a plaintiff, the summoning of the defender of the bond is still required. In the proceeding of dissolution of the conjugal bond, canon law does not exempt the summoning of the defender of the bond and his or her duty to oppose the dissolution of the bond if reasonable.

As a necessary passive party in the proceeding of nullity of marriage, the defender of the bond is recognized in c. 1687 as having the power to appeal the decision of nullity. Strictly speaking, the defender of the bond has this power in all proceedings of nullity, whether addressing marriage or sacred orders, as can anyone who considers himself harmed by a legal sentence (c. 1628). This occurs despite the heavy burden of formal character of the defender of the bond, based on the nature of the public office exercised in defense of the interested parties, also public, of the Church.

The only hypothesis in which the passive position of virtual opposition to a claim can become an active position is on opposing the sentence of nullity. There the defender of the bond will take the initiative of the appeal in the following procedural instance. Such an active attitude of objection before the superior court remains compatible with the defender of the bond's initial attitude of opposition to the demand. In the appeal, the defender of the bond can activate the mechanical process for the superior court to decree a revocation of the nullity. However, when adopting this proper posture of the dynamic process, the defender of the bond continues to maintain the original position of one who declares opposition to the claim that gave rise to the process.

Not only in the first instance will the defender of the bond always be a necessary passive party in the procedural relationship born as a consequence of the summons that must have been received, but also if he was in fact present, spontaneously, in the process (c. 1433). He is also a party of a public nature due to the title with which he acts in the process. In the exercise of a stable public ecclesiastical office, his exclusive function is to oppose claims of nullity. Based on such an office and the attributions of public activity derived from it, it is fitting to regard the defender of the bond as similar to the promoter of justice (see commentary on cc. 1430 and, especially, 1431). That is, in the defender of the bond, the juridical condition as a party in the process, with all its rights and powers to act, is perfectly compatible with that of the title of a public ecclesiastical office, with all the juridical public responsibilities that fall upon judges, as legal ministers of the tribunal of justice. In the same way, such doctrine can be deduced from the *CCEO* (cf. cc. 1096, 1103–1116).

3. The Ap. Const. of Benedict XIV, *Dei miseratione*, of November 3, 1741[2] introduced the defender of the bond in the system of canonical procedure. The Roman Pontiff tried to repair the corruption and abuses that

2. Cf. P. GASPARRI, *Codicis Iuris Canonici Fontes*, I (Rome 1926), pp. 695–701.

were committed in the processes of nullity of marriage. To avoid harmful manipulation of spouses seeking the nullity of a marriage, the Pontiff ordered that each diocese should have a *matrimoniorum defensor.* A suitable subject adorned with virtue and integrity, instructed in the science of the law, should hold this office. All the functions of this office would be related to the defense in court of the validity of marriage before claims of nullity. He could present evidence and assist in the examinations and had an obligation to appeal any decision of nullity. He was even conceded the privileged possibility, in the case where the second decision was also nullity, to appeal the second decision. The privilege to appeal the second decision of nullity remained in force until the *CIC*/1917, in c. 1987 preserved it *pro sua conscientia.* The privilege to appeal the second decision of nullity was found also in 1936 in the *Provida Mater* 220 and 221. Similarly, the obligation of the defender of the bond to appeal the first sentence of nullity continued to be imposed by c. 1986 *CIC*/1917 and in *Provida Mater* 212 §§ 2 and 3. In the *CIC*, the rule of appealing sentences of nullity of marriage is found in a distinct and specific regulation (see commentary on c. 1682).

Although according to the Ap. Const. of Benedict XIV, the defender of the bond could be considered a minister of the tribunal, art. 7 § 1 offered the following qualification: *pars necessaria ad iudicii validitatem et integritatem censeatur.* In the same way, the defender of the bond appears as not only a necessary passive party, but also a public party with a specific public procedural mission. That mission is to affect the public interest of the Church by only declaring null those marriages that can effectively be declared so. By law, the bond of marriage will possess, in a process whereby nullity is claimed, the protection offered by this new public office designated with the title defender of marriages.

In addition, the Instr. of the S. Congr. of the Council of August 22, 1840, apart from insisting on the same themes regulated by *Dei miseratione*, extends the obligation of summoning the defender of marriage in cases regarding the dissolution of marriage.[3] Through various normative vicissitudes—some of great interest for the Church of Austria—the Instr. of the S. Congr. of the Holy Office of June 20,1883, directed to the Eastern Catholic Churches first used the term that would later be accepted by all: *defensor vinculi* (art. 18).[4] Canon 1996 *CIC*/1917 prescribes that the defender of the bond of sacred ordination enjoys the same rights and has the same obligations as the defender of the bond of marriage. Perhaps it was the norms contained in c. 1869, in contrast with those in c. 1868 (both of the *CIC*/1917), which tended to convert the defender of the bond into a

3. Cf. SCCONC, *Instructio pro confectione processus in causis matrimonialibus*, August 22, 1840, in *AAS* 1 (1865–1866), pp. 439ff.

4. Cf. SCSO, *Instructio ad Patriarchas, Archiepiscopos, Episcopos Rituum Orientalium in causis matrimonialibus adhibenda* ..., June 20, 1883, in *AAS* 18 (1885), pp. 346.

type of instructor of the process. The norms even conceded to the defender some initiatives that, from this perspective, led Mons. del Amo[5] to esteem that in the defender there existed a juridical superiority that placed him on some occasions not just *beside* but even *above* the judge. This emphasized the character of a privileged party with which the defender of the bond has many times been qualified.

In *SNAS*, art. 1, the defender of the bond appears, with the promoter of justice, as one of the stable ministers of the tribunal. Nonetheless, in art. 37, the defender is considered a party in prescribing that the sub-secretary should make him a participant in the summons that convokes the adverse party to the litigation. In the same way, in the judgment of new instance, the defender appears as constituting the contradictory procedure together with the parties.

In the *NSRR* (1994), the defender of the bond appears as a stable office established in the tribunal, whose goal is to protect the bonds of sacred ordination and of marriage, with the possibility of naming one or several substitutes *ad tempus*. The defender or his substitutes should intervene in cases of nullity of ordination or of marriage and in the dispensation of the *super rato* (arts. 7, 29 and 30).

CM, although paying little attention to the defender of the bond, nonetheless continued to maintain the obligation of the defender of the bond to appeal the first decision of nullity to the superior court. In its rule VIII § 1, this obligation is maintained, in spite of the precedent established in the 1944 allocution of Pius XII to the Roman Rota indicated that the defender of the bond must not necessarily act *pro nullitate*, since although he possessed the procedural title of defender of the validity of the bond of marriage, he should always proceed *pro rei veritate*, Therefore, until the *CIC* (c. 1682), it was not explained how to arrive at the double conformity with the nullity declared by a first decision if none of the parties, including the defender of the bond, appealed the decision.

4. The text of the canon is clear in relation to the mission of the defender of the bond in procedures of nullity and in dispensation of the *super rato*. It is constituted in the diocese as an office that *tenetur proponendi et exponendi omnia qui rationabiliter adducit possint, adversus nullitatem vel solutionem*.

The office clarifies its position providing, through proposals and expositions, all that reasonably favors opposition to nullity or the dissolution. By not deciding but alleging that which supports the marriage or sacred order, means that the office corresponds to the claimant in a process against nullity.

5. Cf. L. DEL AMO, *La defensa del vínculo* (Madrid 1954), p. 277.

Corbí has made a detailed exposition regarding the civil and canonical procedural doctrine with respect to the nature of the party of the public minister in the process, specifically the defender of the bond.[6] Nonetheless, it must be noted that the person who opposes what is requested in the claim, and enters into opposition to the claim before the judge or tribunal, can do so because the defender is a party in the process. Always being a third principal or litigant, however, the defender's opposition has been acceded to the party later. To be a party means to possess a formal position in the procedure, independent of the title that legitimizes the intervention or its relation to the procedure. The title is what gives the right to a favorable decision if the defender deserves the accession of the titular to what has been requested. To be a party grants a right to speak in turn to the decision and a right to present to the judge or the tribunal all the arguments and proofs that favor the procedural position based on the title the defender holds. The concept of party is a strictly procedural concept.

However, the defender of the bond also has title to defend the public good in cases of nullity of marriage and of sacred orders and in dispensation *super rato*. This title is a stable public office that originates in the diocese upon being named by the bishop (c. 1435) or in other tribunals of the Church upon being named by legitimate competent authority. The defender's mission, upon being named and entering into possession of the office, is to defend the public good that c. 1432 concedes and to demonstrate in the scope of the process all that can reasonably be proposed and argued against the nullity or the dissolution.

The defender of the bond is protected by a specific public good that is not in opposition to what is generally attributed by c. 1430 to the promoter of justice. The defender of the bond and the promoter of justice are compatible public offices in most cases: that of the promoter of justice in general, and that of defender of the bond in its determination specified by proper law. Only in the hypothesis of c. 1674,2°, in which the promoter of justice exercises the action of nullity of marriage when the cause of the nullity has already been divulged, is there confrontation between the two offices charged with protection of the public good. In this hypothesis, each office focuses on its own view in order for the judge or court to decide which public good prevails and is deserving of the judicial sanction. However, these conflicting public goods do not occur exclusively in processes where the defender of the bond acts. In any contentious case, there is a possible conflict between juridical positions that do not agree when the public good is considered from different perspectives.

The defender of the bond defends, from his procedural position, the public ecclesiastical good implied in an apparently valid marriage or in a sacred order that is externally well administrated. The defense is

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6. Cf. A. CORBÍ COPOVÍ, *El Defensor del vínculo matrimonial,* Doctoral thesis of the Faculty of Law of the University of Navarre (Pamplona 1994), pp. 110–145, *pro manuscripto.*

exercised before the judge or the court, are also conveyers of the public interest. Opposition to the concession of a dispensation *super rato*, for which the defender of the bond considers there were no reasonable motives, may also be put before the legitimate authority. The defender of the bond's action will always be *pro rei veritate*, principally because no one can act procedurally against the truth, especially one who protects the public good. The role of the defender of the bond in these processes coincides with that of the Church itself, which is also interested in avoiding manipulation of the truth, putting it in the service of interested individuals in nullity and dispensation. The canonical legislator has attached some guarantees to the sacraments of marriage[7] and sacred orders. These guarantees include the procedural defense of the bond by the defender of the bond as a public party in the process and as petitioner of opposition to the claim of nullity or the request for dispensation. Further, the defender of the bond acts, not only as a procedural party, but also always as legitimate petitioner for presenting opposition, as long as reasonable motives exist.

As John Paul II indicated, the defender of the bond is not responsible to "evaluate the arguments for and against and make a pronouncement regarding the existence of the cause." Rather, the defender is called to "collaborate in the search for the objective truth,"[8] as occurs with the parties, which should also present such collaboration from their individual positions. The role of the defender of the bond is as a legitimate and necessary passive party, but a public party. Such necessity should not be confused with a mere formality. The public responsibility, as a public office exercised before the court, does not allow confusion between the conveyer of public interest in the process and the simple conveyer of some private interests.

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7. Cf. C. DE DIEGO-LORA, "La tutela jurídica formal del vínculo sagrado del matrimonio," in *Ius Canonicum* 17 (1977), pp. 15–73.

8. Cf. JOHN PAUL II, *Address to the Roman Rota*, January 25, 1988, in *AAS* 80 (1988), pp. 1178–1185, no. 2. This doctrine has been repeated by the most recent popes; cf. Z. GROCHOLEWSKI, "Iustitia ecclesiastica et veritas," in *Periodica* 88 (1995), pp. 7–35.

1433 In causis in quibus promotoris iustitiae aut defensoris vinculi praesentia requiritur, iis non citatis, acta irrita sunt, nisi ipsi, etsi non citati, revera interfuerint, aut saltem ante sententiam, actis inspectis, munere suo fungi potuerint.

In cases in which the presence of the promotor of justice or of the defender of the bond is required, the acts are invalid if they were not summoned. This does not apply if, although not summoned, they were in fact present or, having studied the acts, were able, at least before the judgement, to fulfil their role.

SOURCES: c. 1587; Signatura 15 mar. 1921 (*AAS* 13 [1921] 269); *PrM* 15 § 2

CROSS REFERENCES: cc. 1430–1432, 1436,2°, 1457, 1511, 1513 §§ 2 et 3, 1587–1590, 1592, 1594, 1619, 1661 § 3, 1674,2°, 1686, 1687 § 1, 1688

COMMENTARY

Carmelo de Diego-Lora

1. Canon 1430 prescribes that, in penal and contentious cases where the public good is at stake, the office of promoter of justice must be established. It is this office that must be exercised in the process when the public good is at stake (cf. c. 1431).

In the same way, according to c. 1432, the defender of the bond must be present in cases of nullity of marriage or of sacred orders, and in dispensation *super rato.* This person is, by office, obliged to propose and demonstrate all that can reasonably be argued against the nullity or dissolution.

In c. 1433, the imperative terms for promoter of justice and defender of the bond are also used when dealing with cases in which the presence of one or the other or of both is required. Both offices may be required in a case of nullity which, because it has been made public, is included in c. 1674, 2°. Then both offices are required, *iis non citatis, acta irrita sunt,* unless failure to summon is remedied by another type of presence.

In principle, the failure to summon results in the nullity of all procedural acts later produced. This nullity is sufficiently described by the canon and is perfectly covered in the general premise of c. 10, since it has been established *expresse.* Therefore, in any procedural moment, being aware of the lack of summons, either the promoter of justice or the defender of the bond may enter into the process to which they are obligatorily called to appear and defend the public good. The promoter or

defender may propose an incident (cf. cc. 1587–1590) of nullity of proceedings, claiming that the process must return to the first moment of admission of the demand. Thus, the defendant or defendants and the holders of public office, who not having been summoned in the first instance, may be summoned anew.

It can be said that the lack of specific citation causes the nullity of the proceedings, in a manner similar to a failure to summon the defendant or a citation generally carried out illegitimately, according to c. 1511. This parallel is explained by the fact that when all the parties who should be present in the process are not summoned, the instance cannot even be initiated (c. 1517). Therefore, the juridical procedural relationship that gives rise to the right of all parties to a decision does not arise. Consequently, another implicit result is that the litigious *res* has not lost its integrity, nor has the tribunal made the case its own, nor has the principle of *perpetuatio iurisdictionis* been given, nor have any other effects of c. 1512 been found. Without summoning the defendants or those who by public office should be present in the process, the process has not arrived at its inception. In addition, without this summons, the right of the claimant to a judgment has not even arisen.

In addition, if this apparent process advances without the lack of citation being pointed out by the judge or tribunal, inasmuch as this indicates a defect, the judge or tribunal should pronounce the appropriate decrees of citation to signify a new claim of process. Thus, the process returns to the decree of admission of the claim, to which the new decree ordering the necessary citations should be added. There is not even an obligation to hear the parties, as prescribed in c. 1591 to reform the decrees or interlocutory judgments, even when proceeding ex officio. This is because the initiative to avoid the nullity of the proceedings must be taken without regard for the parties themselves, who must already be present in the process. In effect, the process until then turns out to be only apparent, since with the lack of summons of a person who should be party, the instance is not considered initiated. Canon 1452 allows a judge to proceed ex officio in cases deserving this initiative to protect the public good of the Church. What obligatorily constitutes the process continues to pertain to the public good of the Church.

These cases do not deal with a minor or major infraction of procedural norms. The failure to summon negates the process itself. Thus, if the judge or tribunal, due to the omission of the required citation, impels the processor allows it to be impelled toward the definitive judgment, such judgment would be found null. The nullity would be irremediable according to c. 1620,4°. The failure to summon a necessary party should be understood either as a failure to petition those who must be active parties in the process, or as a process that was not brought against some respondent.

2. Failure to summon the promoter of justice or the defender of the bond carries with it the absolute nullity of the judgment, according to

c. 1620,4°. This occurs if, in the procedural *iter*, the judge or tribunal does not remedy the radical defect from which the process suffers.

Nonetheless, while the process is ongoing, the defect can be denounced and the judge can apply the precept of nullity of procedural acts and return the proceedings to the initial situation prior to the summons. That is, the route or incidental course of nullity of acts can be applied. Such conduct serves to correct and rectify that which appears to have been initiated, but lacks the needed juridical significance. Beginning with the incidental declaration of nullity, the process may still be pursued by its legitimate channels toward the judgment.

It should be noted that the *CIC* has attempted as much as possible to remedy nullity of proceedings. The purpose is to avoid useless procedural activities lead to unnecessary expenditures, resulting delays, and economic prejudices for the litigants, particularly those who are acting in good faith. This reason justifies the validation of null acts according to c. 1619. But these cases, in which such validation is admitted in referring to the private good of the litigants, are those do not require the presence of the promoter of justice or the defender of the bond. Failure to summon the promoter of justice or the defender of the bond is only validated if they, although not summoned, were in fact present in the proceeding, or were able to examine the acts and able to carry out their office of protecting the challenged marriage or sacred order.

This text of c. 1433 may be seen as softening the effects of nullity of acts derived from the failure to summon as regulated in the previous c. 1587 *CIC*/1917. Thus, for example, Acebal sustains that the new canon "simplifies and softens the old norm," since in the *CIC*/1917 there was no remedy if the promoter of justice or the defender of the bond were not able to attend any act, even if the promoter of justice or defender of the bond had been able to inspect the acts at a later time. On the other hand, in the *CIC*, if they were not summoned but were present at any act of the proceeding or at least able to complete their official examination of the acts, the proceedings were valid"[1] Other authors share Acebal's opinion.

It appears that the adoption of such a posture signifies the application of the concept of procedural charge to the options the promoter of justice and the defender of the bond have in the canonical process. It also signifies that the remedy of the procedural nullity will always be possible if the promoter of justice and the defender of the bond are able to carry out their mission through this effective presence in fact. It is not enough for them to have only been able to inspect the acts before the judgment. Thus, Calvo-Del Amo, commenting on this canon, considers that the new clause (*aut saltem ante sententiam, actis inspectis, munere suo fungi potuerint*), "is equivalent to a condition that, arriving at the specific case,

1. J.L. ACEBAL, commentary on c. 1433, in *Salamanca Com.*

must see if it is verified or not, because it is very problematic that, with a report or final ill will before the definitive judgment, it can be said that they have carried out their office, without intervening in the admission of the claim, in the fixation of doubt, in the proofs practiced and not practiced, in the incidents, in the exceptions, etc."[2]

Corbí,[3] after making a study comparing the parallel texts of cc. 1587 *CIC*/1917 and 1433 *CIC*, concludes, "the examination of the acts is absolutely necessary." He further sustains that such examination "must be realized through the propositions and expositions that the defender considers relevant in relation to the acts that are submitted for his judgment." Corbi adds that the absence of the defender of the bond "cannot be just compared to the absence of a party. The defendant is recognized with the faculty to be present in the process. The defender of the bond *tenetur* (c. 1432), that is, has an obligation—not the simple *faculty*—to participate in the process. And the judge has the right-duty to require this participation." This can be done with major or minor discretion, according to his intellectual qualities and professional competency. However, the defender of the bond must always intervene in such a way that the office can be carried out. If, when he is present in the process, he does not have the procedural space to carry out the office, he will be obliged to present an incident of nullity of act by the infraction of c. 1433.

This explains the affirmation that Corbí makes later, in reference to the defender of the bond: that this intervention "in the processes in which his presence is required by law is absolutely necessary. It is an obligation of the holder of the office that is required both by the title of defender in itself, and according to the law (c. 1432)."[4]

It is in this context that the words of John Paul II are understood completely: "the role of the defender of the bond is irreplaceable and of maximum importance. Therefore, his absence in the process of nullity of marriage makes the acts null (c. 1433)."[5] The term "absence," referring to the person who by law and under threat of nullity is obliged to appear and defend the procedural posture that the public good demands, cannot be identified with the failure to appear is regulated in cc. 1592 and 1594. Thus, the effects are not derived from a failure to confront the procedural charge. The criteria of the charge does not govern the procedural conduct of the promoter of justice and the defender of the bond in those processes in which they must be parties. Rather, it governs their public obligation to argue in favor of the public good of the Church. If they act as required (as

2. Cf. commentary on c. 1433, in *Pamplona Com.*

3. Cf. A. CORBÍ COPOVÍ *El Defensor del vínculo matrimonial,* doctoral thesis from the Factulty of Law at the University of Navarre (Pamplona 1994), pp. 243–246, *pro manuscripto.*

4. Cf. ibid., p. 246.

5. JOHN PAUL II, *Address to the Roman Rota*, January 25, 1988, in *AAS* 80 (1988), p. 1179, no. 2.

always occurs with the defender of the bond), they cannot fail to appear with the summons. Once they do appear, they must answer and be present in the formulation of the *dubium* and must appeal against the decree of the judge who determines the object of the case when they consider there to be reason to do so (c. 1513 §§ 2 and 3). They cannot fail to attend a hearing in a contentious oral process (c. 1661 § 1), nor can the defender of the bond fail to respond to the summons of the judge according to c. 1686 for the documentary process. The promoter of justice and defender of the bond cannot fail to appeal if they consider to exist the assumptions established for appeal in c. 1687 § 1. They cannot fail to attend the appeal hearing as prescribed in c. 1688. In the same way, if there is proof in favor of the defender of the bond, he cannot fail to present it and protect it in the event that the proof that favors his procedural posture is an *onus* that is not required (c. 1526 § 1), *etc.*

To omit the completion of the duties derived from the exercise of the public office is similar to a judge who, being competent, refuses to administer justice (c. 1457). The failure of the promoter of justice by his own initiative and without authorization of the bishop to act or present himself after having been summoned in a penal or contentious case in which the public good is at stake is unacceptable. In such cases tacit renunciation of the exercised action (c. 1594,2°) is not conceivable. Rather, such cases would provoke removal of the holders of public office for just reasons (c. 1436 § 2) or even the imposition of adequate penalties by the legitimate authority according to c. 1457.

There is a profound difference between this procedural attitude and that of parties who defend only private interests. The difference lies in the purpose of confronting a charge or, on the contrary, public responsibilities, between private and public parties in the canonical process. Such an attitude by the public party is perfectly compatible with the principle *pro rei veritate*. If the promoter of justice considers that a claim should be stopped because he has arrived at the conviction that it lacks foundation, the claim will be stopped but in accordance with the ordinary.[6] If the defender of the bond decides that he should not oppose in good conscience the claim of nullity of a marriage or a sacred order, he will argue such a decision, explaining the motives for the lack of opposition.[7] If it is a proceeding of dispensation *super rato*, the defender will point this out in the observations that are submitted to the bishop for remission, with his opinion, to the Holy See (c. 1705 § 1).

The technical character of these offices, keeping in mind the technical-juridical qualification that is required in the appointments (see commentary c. 1435), guarantees good professional work in these services in the defense of the public good of the Church in the canonical process.

6. Cf., by analogy, art. 25 §§2 and 3 *NSRR* (1994).
7. Cf., by analogy, ibid., art. 26.

1434 **Nisi aliud expresse caveatur:**

1° quoties lex praecipit ut iudex partes earumve alteram audiat, etiam promotor iustitiae et vinculi defensor, si iudicio intersint, audiendi sunt;

2° quoties instantia partis requiritur ut iudex aliquid decernere possit, instantia promotoris iustitiae vel vinculi defensoris, qui iudicio intersint, eandem vim habet.

Unless otherwise expressly provided:

1° whenever the law directs that the judge is to hear the parties or either of them, the promotor of justice and the defender of the bond, if they are engaged in the trial, are also to be heard;

2° whenever, at the submission of a party, the judge is required to decide some matter, the submission of the promotor of justice or of the defender of the bond engaged in the trial has equal weight.

SOURCES: *SN* can. 64

CROSS REFERENCES: cc. 1430, 1432, 1435, 1451 § 1, 1452, 1484–1485, 1490, 1505 § 2,4°, 1507, 1513 § 3, 1514, 1517, 1524 § 3, 1526 § 1, 1527, 1533–1534, 1555, 1582, 1588, 1589 § 1, 1591, 1598ff, 1603 § 3, 1606, 1616 § 1, 1618, 1626 § 1, 1628, 1644, 1652, 1678 § 1, 1659–1661

COMMENTARY

Carmelo de Diego-Lora

1. This canon regarding the promoter of justice and the defender of the bond that is also without precedent in the *CIC*/1917. It prescribes that the rights the *CIC* concedes to the parties regarding hearings before the judge can also be applied to the promoter of justice and the defender of the bond if they are already in the proceeding. As the legal text states, *si iudicio intersint.* This phrase appears in different canons with slight variations and indicates that, if the promoter of justice or the defender of the bond intervenes in a process, he has the same juridical powers attributed to parties. This is seen clearly in the transaction of an incident of objection of c. 1451 § 1. The phrase applies to the moment of sentence when there was no last defense (c. 1606), with the legitimate intervention in a plaint of nullity (c. 1626 § 1), and in the legitimization of an appeal (c. 1628). It is also seen in c. 1678 § 1, regarding the right to be present at

the examination of the parties, witnesses, and experts in cases of nullity of marriage; to inspect the judicial acts, even if they are not published; and to examine documents produced by the parties.

Other canons also exist in which, as occurs in the general norm of c. 1434, the promoter of justice and the defender of the bond are directly given a status equal to the parties. This occurs in cc. 1533 and 1534, regarding the interrogation of the parties, and in c. 1561, regarding the interrogation of witnesses.

2. The assimilation of the rights of a party is even broader than what is reflected in c. 1434. In both acts of procedural impulse and acts of initiative, it appears that the equality of procedural options is guaranteed in favor of the promoter of justice and the defender of the bond at the same level as guaranteed to private parties. However, Arroba Conde[1] has questioned whether they have this same scope for acts of initiative.

The defender of the bond logically lacks that initiative directed at seeking the opposite of what the defender should protect. However, this lack is not derived from his condition as a party, but from his legitimization *ad causam* y *ad processum*, since the defender only has legitimate title to act in favor of the validity of the sacred bond judicially challenged by another.

The same can be said of the promoter of justice. If he effectively has legitimacy to exercise the action to charge crimes in penal cases and to charge nullity of marriage if the nullity has already been divulged, the promoter's mission is to protect the public ecclesiastical good (c. 1430) when it is threatened, in danger, or suffers some harm. If such cases, the promoter of justice must exercise the judicial actions that will protect this public good. We find ourselves, therefore, addressing a theme of legitimacy rather than procedural rights of parties. The latter governs the principle of equality of parties. On the other hand, in the theme of legitimacy—*ad causam* or *ad processum*—each subject of ordainment has the procedural initiative submitted to the conditions of his legitimizing title, if a favorable judgment is desired. To the contrary, the promoter of justice cannot be favored by the judgment desired, and his own claim can be rejected *in limine litis* if the judge notes a lack of *fumus boni iuris* (c. 1505 § 2,4°).

3. Arroba Conde notes a very different theme when he affirms the following: "The comparison is also minor when the law concedes to public parties some authorities that are not directly enjoyed by private parties, but rather through their representatives (the possibility to see the acts of the process of nullity of marriage before they are published, to attend interrogations, c. 1678)."[2]

1. M.J. ARROBA CONDE, commentary on c. 1434, in A. BENLLOC (Ed.), *Código de Derecho Canónico* (Valencia 1993), p. 634.
2. Ibid.

In effect, an apparent inequality is presented in these cases. Nonetheless, such inequality does not take place when the parties come to the proceedings accompanied by attorneys, in whose supposition the inequality disappears (c. 1678 § 1). The parties directly enjoy the right of postulation (c. 1481 § 1), but this right can have different scopes, as is supported even in c. 1485, when parties act in the process through procurators. In these cases, the mandate *ad lites* (c. 1484 § 1) is not enough to carry out acts of disposition in the action or the process, because such acts exceed the authority conceded in the general mandate for litigation.

From another perspective, in a general way, the right of postulation of parties themselves can be found procedurally in situations in which the legislator requires a complement for technical-juridical reasons. The right requires that a person who intends to defend his own rights be accompanied by the scientific and professional competency, according to the case, of an attorney or a procurator. It occurs, for example, in the penal court, where it is necessary that the accused be accompanied by an advocate (c. 1484 § 2). In the same way, the judge can consider it necessary that a procurator or an advocate be present at any contentious case (c. 1484 § 1). Similarly, c. 1484 § 3 imposes the attendance of a technical defense for contentious cases in which a minor is party, or the public good is at stake, excluding cases of marriage. However, even in marriage cases the free appointment of advocates or procurators is facilitated in a great way, through the new institution of permanent legal representatives (c. 1490).

From the point of view just discussed, the right to examine the judicial acts, to attend interrogations of parties and witnesses in proceedings of nullity of marriage, and to attend the expert testimony as authorized in c. 1678 § 1, is not exactly derived from the concept of party itself. Rather, it becomes a procedural right conceded to the party in that the party has sufficient technical-juridical representation to accede to this knowledge, which can only be acceded to those that have sufficient legal preparation.

Both the promoter of justice and the defender of the bond possess this adequate legal preparation, since they are required to hold a doctorate or a licentiate in canon law (c. 1435). The party who attends the process accompanied by and acting through the necessary attorney also possesses this competence in the specific field of the process of nullity of marriage. Legal competence is therefore more than a matter of procedural rights; it is a matter of postulation of the parties to an equality of treatment before the procedural options offered to them.

4. Is the principle of equality maintained in all the procedural options offered to the parties? This appears to be the case, although the defender of the bond has been characterized as being in effect a public but privileged party. He was considered a party who could even, according to c. 1987 *CIC*/1917, appeal a second decision of nullity, remaining thus *pro sua conscientia*, and privileged with a procedural option that the married litigants did not have. This concept of a privileged party received special

attention in 1936 by the authorities to which the arts. 70–72 of *Provida Mater* are attributed. These articles did not establish any norm that could identify the defender with the judge, but they did supply the defender with the power of investigation and initiative before the tribunal, in its procedural activity. The defender's power weighed the balance in favor of the faithful when compared with the powers and faculties possessed by the married litigants. The promoter of justice, on the other hand, had less favorable treatment for his defense of the public good.

The *CIC* has eliminated these differences in juridical treatment, and in c. 1434 tries to establish the principle of equality of procedural options with private parties. Nonetheless, the new legislative body contains norms that still present traces of the ancient privileged condition of the public ministry as a procedural party, including the right conceded in c. 1603§ 3 to the promoter of justice and the defender of the bond to retort to every reply of the parties. In contrast, the parties' right to reply again is only with express permission of the judge (c. 1603 § 2).

A second example of where the principle of equality seems to be maintained is in c. 1606, in which the judge would have to pronounce an immediate judgment because the parties failed to present their defenses or because they simply entrusted themselves to the knowledge and conscience of the judge. Even if the judge has a clear understanding of the questions and is disposed to pronounce judgment, he must first seek the observations of the promoter of justice and the defender of the bond, *si iudicio intersint.*

Perhaps such privileges do not deserve more attention, since they seem to be more historical relics of past privileges than a decided intent to sustain privileges in the new *CIC.* In c. 1434, there is an attempt to establish a real comparison, in its procedural options, between the public and private parties present in the proceeding. The canon does not attempt to place the public party first because it defends the public good of the Church. Such public good, from positions of inequality, remains protected by the judge or the court, charged at all times with the just application of the law and gifted with some important attributes by c. 1452 for the safeguard of this public good. This is permitted without fear that both the promoter of justice and the defender of the bond can present themselves as private parties, taking advantage of the same options as their respective procedural postures allow them.

5. According to Acebal, the text of c. 1434 "is new and literally reproduces c. 64 of the Eastern process (m.p. *Sollicitudinem nostram*)."[3] Thus, it does not seem strange that in the *CCEO* c. 1434 is reproduced in c. 1098. It must also be recognized that cc. 1091–1100 *CCEO*, coincide almost literally with the parallel canons of the *CIC.*

3. J.L. ACEBAL, commentary on c. 1434, in *Salamanca Com.*

a) When c. 1434,1° orders that the judge hear either or both parties, he must also hear the promoter of justice and the defender of the bond, *si iudicio intersint*. Situations like this arise from: the summoning of the parties (cc. 1507 § 1 and 1677 §§ 1 and 2; cc. 1659–1661 for the oral contentious process); hearings that permit the judge to formulate doubt (c. 1513) or are necessary by change of request (c. 1514) or the presence or access required for evidence and judicial recognition (c. 1582); or prior hearings for admission of the incidental questions (c. 1589 § 1) or the possibility for the judge to reform or revoke the decree or the interlocutory judgment (c. 1591). Situations may also arise from the prior acceptance or renunciation of the plaintiff (c. 1524 § 3) or from the effects derived from cc. 1598 regarding the publication of the acts, conclusion *in causa*, supplementary evidence, final defense, etc. Finally, in everything the judge specifies to consider the declarations and statements of will of the parties before carrying out the proper procedural acts, c. 1434,1° requires, that the same attention be given to the promoter of justice and the defender of the bond.

b) When c. 1434,2° establishes that anything that would require instance of parties in order for the judge to make a decision, it has the same value for the promoter of justice and the defender of the bond, *qui iudicio intersint*. This completes the procedure's table of possibilities that they have in the process. There is no doubt that the utilization of the term *instance* here is not the same as that of c. 1517.

This large section includes all oppositions to definitive judgments if the promoter of justice or the defender of the bond intervened in the process; namely, complaints of nullity, appeal, *restitutio in integrum*, and even the *nova causa propositio* of c. 1644. All these oppositions of interlocutory judgments and decrees can produce definitive effects (c. 1618), susceptible to appeal according to c. 1629,4°. So one must also include the possibility of expediting incidental cases in general (cf. c. 1588) or some specific incident as in the *de iure appellandi* (c. 1631), or when an instance occurs in which the judge issues the executing decree (c. 1651), or when within the execution itself an incident of statement of accounts is presented (c. 1652).

Sometimes procedural rights are implicit as pertaining to the parties. Other times, the rights of parties are explicit, as occurs in the opposition of a decree of formulation of doubt (c. 1513 § 3) or when the admission of evidence is insisted upon (c. 1527 § 2). The rights of parties are explicit also when the exclusion of a witness is requested (c. 1555) or when the judgment must be corrected or completed due to a material error or similar reasons as outlined in c. 1616 § 1. In conclusion, whether by express reference to the rights of parties, or because such a right is understood, it is sufficient that private parties have the procedural option to encourage, by instance or petition, some judicial decision as long as we understand that the promoter of justice and the defender of the bond can respond from their proper position as holders of offices that protect the public

good, whether in general for the promoter, or in the specific position canon law attributes to the defender of the bond. It appears obvious that both offices also enjoy the legal authority to request all possible evidence to demonstrate their affirmations or to contradict the opposing party (cc. 1526 § 1 and 1527 § 1).

6. On establishing the general postulate that both the promoter of justice and the defender of the bond are true procedural parties and that they act with procedural options equal to those of the parties, we are not trying to confuse the roles of promoter of justice and defender of the bond with roles of other participants in the process. Nor are we trying to reduce the promoter's or defender's role to the completion of a mere formality. The importance of both ecclesiastical officers in the process when they debate interests affect the public good must be emphasized. The officers must be summoned and in fact present in the proceedings under threat of nullity of the proceedings, but in such a way that, also under threat of nullity, the completion of their mission in protecting the public good, attributed to them by canon law, is guaranteed. If they cannot complete this mission, in spite of their presence, the procedural acts are invalid.

It should also be emphasized that, while the procedural attitude of these public offices of the Church in reference to procedural options is like that of the parties, conversely, this attitude, when addressing the dimension of the diverse responsibilities, is very different in the case of public and private parties. Public parties will work in accordance with their proper interest, which they may freely dispose of or even renounce. Consequently, public parties may choose not to exercise their procedural rights. On the other hand, the obligations to appear, allege, prove, oppose, *etc.*, are obligations for private parties only. Private parties may or may not complete these obligations, knowing that if they do not complete them, according to the implicit requirements in each, they will suffer the damage derived from such procedural conduct. On the other hand, public parties must exercise their procedural mission in the service of a public goal; namely, the protection of the public ecclesiastical good. The procedural options in favor of the rights and interests that protect the public good become, for the promoter of justice and the defender of the bond, legal obligations of a public nature. In the same way that they must necessarily be present in the process to safeguard this public good, they must also claim, appear, formulate allegations that are conductive to such protection, present proof, and oppose judicial decisions, within the concept of the principle *pro rei veritate*. Within these coordinates, there is no contradiction with the principle of equality of procedural parties that, when acting in the judicial scope of the public good, are generated for these public responsibilities that, in case of omission of their obligations, can be required by the legitimate authority of the Church.

Similarly, no contradiction is produced with following the guidelines and concerns that the legitimate ecclesiastical authority, on which the

public office depends, suggests in a general way. Thus, the Roman Pontiff indicated to the defender of the bond some guidelines for action, in the service of the public good implied in marriage, in the address of January 25, 1988.[4] The guidelines include: effective contribution in specific marriages to the clarification of facts and their significance; defense of the Christian view of human nature and of marriage (concerning which, technical psychiatric findings regarding married couples will not be automatically translated to the field of canon law); avoiding confusion between tensions and difficulties in the marriage and signals that indicate a grave pathology; and knowledge by the defender of the bond that the course of legal discussion remains in the scope of his specific canonical competency. That competency is to justly value the opinions and indicate the risks of the incorrect interpretation and to duly contrast it with the Christian view of human nature and marriage.

All of these indications are points of light for the public office to be duly exercised in justice with respect to the central question and in protection of the public good of marriage itself. Apparent warnings for the appropriate discharge of the ecclesiastical office could be made to the promoter of justice. This forms part of what we could designate as recommendations for science and prudence in the exercise of the profession. None of these indications advises any reclamation of procedural privileges or affect the principle of equality of procedural options between public and private parties is guaranteed by the cited legal texts of the *CIC*.

4. Cf. *AAS* 50 (1988), pp. 1178–1185, nos. 3–12.

1435 **Episcopi est promotorem iustitiae et vinculi defensorem nominare, qui sint clerici vel laici, integrae famae, in iure canonico doctores vel licentiati, ac prudentia et iustitiae zelo probati.**

It is the Bishop's responsibility to appoint the promotor of justice and defender of the bond. They are to be clerics or lay persons of good repute, with a doctorate or a licentiate in canon law, and of proven prudence and zeal for justice.

SOURCES: c. 1598 § 1; *PrM* 21; PAULUS PP. VI, Rescr., 26 mar. 1976; Signatura Decl., 12 nov. 1977

CROSS REFERENCES: cc. 97 § 1, 98 § 1, 145–147, 149 § 1, 368, 381 § 1, 427 § 1, 428 § 1, 1420 §§ 4–5, 1421–1422, 1424, 1430, 1432, 1436 § 2, 1512, 2° et 3°

COMMENTARY

Carmelo de Diego-Lora

1. "It is the Bishop's responsibility to appoint the promoter of justice and the defender of the bond." These words resolve a conflict introduced with c. 1589 § 1 *CIC*/1917, in which the appointment was attributed to the ordinary. Authors debated whether the Vicar General could make the appointment.

On the other hand, given the relevance that the appointment of the promoter of justice and the defender of the bond is given in the tribunal of the Roman Rota, it is logical that the diocesan bishop should make these appointments. In effect, in arts. 6 and 7 of the *NSRR* (1994), the promoter of justice and the adjunct promoter, as well as the defender of the bond, are included among those offices proper to the tribunal. The promoters of justice and the defenders of the bond, as well as their substitutes, are appointed by the Roman Pontiff through proposal of the Rotal College (art. 13 § 1). In the same way, the special norms for the Signatura place the promoter of justice and the defender of the bond among the singular offices of this tribunal (art. 8). They are also named by the Roman Pontiff (art. 2).

The appointment by the bishop is realized through a canonical provision of free conferral (cc. 146 and 147). This freedom of designation is limited only by those conditions in c. 1435. The concept of ecclesiastical office in c. 145 § 1 comprises, as Arrieta says, "each one of the individual charges

that make up the organization of the Church, and that carry out legal functions in a stable manner with a spiritual goal."[1] This concept is applicable to offices of divine law (e. g., the Roman Pontiff or the bishops in individual Churches) and human law (Vicar General, Judicial Vicar, etc.).

2. In the same way, territorial prelates and abbots, vicars, and prefects apostolic, and apostolic administrators whose administrations have been permanently established (cc. 381 § 2 and 368) can make this appointment. In a vacant See, it is unclear whether the diocesan administrator can appoint the promoter of justice and the defender of the bond. While c. 427 § 1 prescribes that the diocesan administrator possesses all the authority of the diocesan bishop, canon 428 § 1 notes that, during the vacancy of the See, the principle *nihil innovetur* rules. The importance of these offices in the service of protecting the public ecclesiastical good could mean that an appointment by a diocesan administrator would violate this principle. Since c. 1436 § 2 permits the establishment of promoter of justice and defender of the bond *ad singulas causas*, the diocesan administrator should respect the appointments made by the previously competent bishop, and if an unforeseen need for replacement arises, he could cover the demands of the situation through the route of designation for individual cases. According to c. 1590 § 1 *CIC*/1917, the promoter of justice and the defender of the bond appointed for all general cases do not leave office when a vacancy is produced in the episcopal See. They are permanent members of the judicial organization of the diocese, directly appointed by the bishop, like the judicial vicars. Canon 1420 § 4 says the promoter of justice and the defender of the bond do not cease, nor can the diocesan administrator remove them, when the See becomes vacant. The same principle *perpetuatio iurisdictionis* fights for permanency of the members of tribunals of justice in transitional situations, such as a vacant See (cf. c. 1512,2° and 3°). García Faílde understood that norms cc. 1420 § 5 and 1422 regarding judicial vicars, could "be applied, by analogy, to the promoter of justice and the defender of the bond chosen for all cases," making those appointments "nothing more than for a determined time."[2]

According to c. 145, the stability of the offices of promoter of justice and defender of the bond, depends on the canonical provision of the office, which must be done in principle for all general cases. Without prejudice, substitutions and other events regarding the promoter of justice or defender of the bond must be designated *ad singulas causas* (c. 1436 § 2). These, not being related with the notion of stability prescribed in c. 145 § 1, cannot be titulars of an ecclesiastical office. It seems only possible hypothetically to consider the constitution of an ecclesiastical office when a promoter of justice or defender of the bond is appointed for some judicial case that is processed in the diocesan tribunal, anticipating a certain

1. J.I. ARRIETA, commentary on c. 145, in *Pamplona Com.*
2. J.J. GARCÍA FAÍLDE, *Nuevo Derecho Procesal Canónico* (Salamanca 1984), p. 67.

temporarily expanded development and with a constant dedication to the case. Nonetheless, the office that maintained these appointments would not be permanent, but only prolonged by the judicial case. Thus, the permanence of the office would not apply, since it would depend only on the temporality of the process, whose duration would always be so uncertain as to oppose the idea of stability.

Only those appointed by the bishop for these public ecclesiastical offices *ad universitatem causarum* could hold the offices. The obligation of appointment that is derived from the terms *constituatur in dioecesi promotor iustitiae* of c. 1430 and *constituatur in dioecesi defensor vinculi* of c. 1432 refers only to these appointments.

In the Roman Rota, it is possible that the dean of the tribunal can entrust *in singulis causis* the presentation of the oppositions to the person who possesses a doctorate in canon law and the diploma of a Rotal attorney (art. 7 §§ 2 and 4 de *NSRR* 1994). This is different from the substitutes, whose permanence is determined by the time for which the appointment is extended. In a diocese, the bishop may name these promoters of justice and defenders of the bond *ad singulas causas*, since the canon does not make exceptions. Nonetheless, it would not contradict the spirit of the canonical norm, that due to the singular and limited character of these appointments they be attributed to another authority of the diocesan curia, such as the judicial vicar. In an attempt to maintain coherence with the system of the *CIC*, the bishop would intervene at least in the approval. However, this is only noted as a possible solution *de lege ferenda*, since the rule of the canon is clear with respect to such appointments. In short, these appointments *ad singulas causas* contradict the notion of ecclesiastical office in the *CIC*.

3. The canon not only prescribes who must make the appointments, but also the specific conditions must be found in the persons chosen for the offices.

First, the canon says *qui sint clerici vel laici*. There is no intention in the *CIC* to exclude the religious, or those that are not expressly mentioned. All things considered, this is a distinction that is also seen in c. 1421, which addresses diocesan judges, who are to be clerics, although laypersons can be appointed, but only one can be integrated in a tribunal college in the case of necessity and with the authorization of the episcopal conference. This express mention of the lay in relation to clerics, in order to receive appointments that involve holders of ecclesiastical offices, is presented as an innovation in the *CIC*, so it is understandable that such a distinction is emphasized in the legislative text. However, the mention does not indicate exclusion of other faithful for these offices, such as religious, whether or not they are clerics. Religious can also be appointed, with the appropriate authorizations of their legitimate superiors, if they have the qualifications of professional capacity and moral disposition required by the canon.

Canon 1589 § 1 *CIC*/1917, predecessor of c. 1435, reserved these ecclesiastical offices to priests. On the occasion of the m.p. *Causas matrimoniales*, although it did not prescribe that titulars of the protection of the public good could be laypersons, the option for laypersons was laid out by procedural doctrine in the reform of canon law. This was because advisors to the judge, such as the notary and a member of a collegial tribunal, could be laypersons.[3] The concession by the Roman Pontiff to the Apostolic Signatura of the authority to concede authorizations to specific bishops, in cases of necessity, for designation of a layperson as defender of the bond, is well known. A favorable environment for a generalized admission of laypersons to hold the offices promoter of justice and defender of the bond was thus created in the commission reforming the *CIC*.[4]

For judges, the appointment of laypersons has a subsidiary value. Canon 1421 invokes the reason for laypersons' necessity, limits their number in the tribunal, and mediates a certain control of the episcopal conference. However, in c. 1435, clerics and laypersons are mentioned on an equal plane, in the same way as they are mentioned indistinctly in c. 1424 as being advisors to the sole judge. After a prolonged evolution, a solution was arrived at in c. 1435. In reference to the defender of the bond, the canon now says, "it can be a bishop, priest or deacon, or a lay person, man or woman, single or married; and without specifying a specific age, as occurs, on the contrary, for the judicial Vicar."[5] The same can be said for the promoter of justice.

It is fitting, nonetheless, to make a clarification with respect to age. In principle we do not see a problem in that the norm of the judicial vicars of c. 1420 § 4 may also apply in this case; that is, the age of thirty years must be attained. Now the needs of dioceses may be more varied and they may find grave difficulty in designating titulars to these offices require specific academic degrees. In order to resolve these problems, dioceses can turn to the criterion of the age of majority; that is, eighteen years (c. 97 § 1). This is considered the age at which people can clearly exercise their rights as persons (c. 98 § 1), although this age may not seem sufficient for the responsibility of the defense of the public good before the tribunals of justice. Thus, according to the degree of responsibility of the office, the *CIC* itself determines age requirements. Such ages are usually, according to the transcendence of the office, greater than the age of majority. Perhaps for offices like the promoter of justice and the defender of the bond, the age of twenty-five years required for the priesthood should be required or at least the twenty-three years required for the diaconate

3. Cf. X. OCHOA, *LE*, V, no. 4416.
4. Cf. *Comm.* 10 (1978), p. 239.
5. M. PALOMAR GORDO, "El Defensor del vínculo en el nuevo *CIC*," in *El consortio totius vitae* (Salamanca 1986), p. 410.

of those destined for the priesthood (c. 1031 § 1). It appears that these ages are within the reasonable limits of prudence.

The canon imposes a requirement of professional technical-juridical aptitude for those who are to be designated. It requires an academic diploma guarantees the capacity or aptitude for the technical-juridical function required by either of these offices. Designees for these offices must have obtained a doctorate or licentiate in canon law.

Since only the legitimate competent authority of the Church can issue such academic degrees, it would have to be based on what is laid out in this respect in *SapChr* and the rules given for its application. Article 49 of *SapChr* establishes the general requirements for these degrees.

This rule of c. 1435 ended the criticisms arising from c. 1589 § 1, which required that persons appointed to these offices be doctors of canon law or at least experts in canon law. As Grocholewski has indicated, the requirement began to be interpreted too broadly.[6] Thus, the requirement academic degree required for judicial vicars, associate judicial vicars, and diocesan judges (cc. 1420 § 4 and 1421 § 3) was also required for the promoter of justice and the defender of the bond. , On the other hand, the requirement that attorneys be doctors of canon law or at least *vere peritus* in canon law (c. 1483) was conserved.

The designees must possess some personal conditions of a moral nature only the bishop who makes the appointment may assess in each case. Being a priest of good repute is a requirement for judicial vicars and associate judicial vicars (c. 1420 § 4). Also, for diocesan judges, who can be lay persons, c. 1421 § 3 requires good repute. Good repute is also required for procurators and is implicitly required for advocates (c. 1483). We only indicate parallels of the proper book VII.

In addressing a consideration of social estimation, good repute is objectively verifiable. For this purpose, the diocesan bishop collects written or oral information from persons trusted by the Church. Such persons guarantee that they are well informed and know with certainty the social atmosphere and human environment in which the person under consideration for appointment moves. Such information should be collected with reservation according to the common rules of prudence On the other hand, the qualities of prudence and zeal for justice are so personal, that although the qualities can for this purpose be indicated by trustworthy persons, such qualities signify an exercise of moral virtues whose valuation, ultimately, only concerns those who must make appointments. Perhaps it would be suitable for the bishop to obtain a degree of moral certainty or at least a degree of quasi-certainty in each case. The bishop should use factual or objective information which brings the issue to a secure

6. Cf. Z. GROCHOLEWSKI, "Panoramica sulle novittà del nuovo diritto processuale canonico," in *Il matrimonio nel nuovo Codice di Diritto Canonico* (Padova 1983), p. 188.

conscience, although the negative fear of the possibility of error cannot be excluded.

The requirement of communion with the Church (c. 149 § 1), which implies an effective union with the pastors and the magisterium would have to be added. This communion is manifested specifically in the observance, at least, of the precepts of the Church, practice of the sacraments, and practice of exemplary charity, at least within the sphere of the community of which the chosen person is a part.

Undoubtedly, although these canons say nothing to this respect, laypersons who are in unusual situations in their marriage or who have abandoned their children, or any persons who have incurred some canonical punishment, are in unfavorable situations for such appointments. The Signatura has rejected the ability of a person who is in an abnormal marital situation—such as cohabitation, free union, divorce after civil matrimony—from acting as an attorney in a matrimonial case before the ecclesiastical tribunal.[7] On this basis, this legitimate presence *in Ecclesia* must be required for appointment to offices exercised in the Church, primarily if they refer to ministry of procedural protection of the public ecclesiastical good.

Finally, if we consider the offices of promoter of justice and defender of the bond as public offices to be exercised in the tribunals of justice of the Church, it is fitting to also keep in mind the following facts which indicate the regard these offices hold within the Church. The *NSRR* (1994) requires high academic qualifications for appointment to promoter of justice and defender of the bond of the Roman Rota. Specifically, the candidate must hold a doctorate in two fields of law, or one in canon law and another in civil law, and must have received a diploma as a Rotal advocate. Further, the candidate must have several years of experience in works of the Roman Rota or at least must have performed these works in other ecclesiastical tribunals. Together with this high academic qualification in theory and practice, candidates must be priests of mature age, good habits, and prudence (art. 6 § 2).

For the defender of the bond and for associates *ad tempus*, in addition to the priestly qualities, candidates must also possess these same subjective and moral characteristics. Regarding academic qualifications, a doctorate in canon law and a diploma as a Rotal advocate is sufficient (art. 7 §§ 1 and 2).

According to the *SNAS*, it is required, both for the promoter of justice of the Signatura and for the defender of the bond that they have a doctorate in canon law, demonstrate integrity in their lives and stand out for their juridical expertise.

7. Cf. Reply, June 12, 1993, in *Periodica* 82 (1993), p. 699.

1436 **§ 1. Eadem persona, non autem in eadem causa, officium promotoris iustitiae et defensoris vinculi gerere potest.**

§ 2. Promotor et defensor constitui possunt tum ad universitatem causarum tum ad singulas causas; possunt autem ab Episcopo, iusta de causa, removeri.

§ 1. The same person can hold the office of promotor of justice and defender of the bond, although not in the same case.

§ 2. The promotor of justice and the defender of the bond can be appointed for all cases, or for individual cases. They can be removed by the Bishop for a just reason.

SOURCES: §1: c. 1588 §1
§2: cc. 1588 §2, 1590 §2

CROSS REFERENCES: cc. 145 §1, 153 §2, 193 §§1 et 4, 253 §3, 477 §1, 485, 522, 1420 §3, 1422, 1425, 1430, 1432, 1447–1448, 1451 §1, 1454, 1455 §1, 1456–1457, 1513, 1522,2° et 3°, 1661 §1, 1674,2°, 1677 §3, 1732 ss., 1740–1744

COMMENTARY

Carmelo de Diego-Lora

1. This canon was anticipated by cc. 1588 and 1590 of the *CIC*/1917. These two distinct canons have been rewritten into a single canon with two distinct paragraphs.

The canon regulates three distinct phenomena. The first is the compatibility of the offices of promoter of justice and defender of the bond. The second foresees the possibility of two types of appointments, in general or specifically to one or more cases. The third addresses the removal of appointees.

2. The compatibility of the offices of promoter of justice and defender of the bond is regulated in §1 of c. 1436, which also anticipates when the two offices are incompatible. It responds to what c. 1588 §1 *CIC*/1917 anticipated, although the latter referred to the possible impediment of duty arising from the multiplicity of issues and cases that must be attended. In addition to incompatibility, this indicated the moral impossibility of attending to the duties of these public offices because of insufficient

persons to attend to them and because of the accumulation of necessities that might arise. Such was not an issue of compatibility or incompatibility, but an issue of effective diocesan organization and distribution of duties.

On the other hand, what the canon first does put forth is that a single person can be named as both promoter of justice and defender of the bond. This would most frequently occur in small dioceses, especially when dealing with appointments require highly academically qualified persons. Since these appointments could only fall upon priests in the *CIC*/1917, the choices were very limited. Because the lay faithful can now receive these appointments, the choices broaden, although it is not common to find laypersons with the required academic credentials in scarcely populated dioceses.

This compatibility requirement of the canon is perfectly understandable because the two offices work toward the protection of the public good. The only significant difference is the generality with which the promoter of justice is attributed in his defense of the public good, and the specificity with which the defender of the bond is attributed.

Nonetheless, it must be taken into account that the public ecclesiastical good can be viewed from different points of view, according to the legitimate interest with which a party who attempts to protect the good considers necessary to its defense. In a procedure of nullity of marriage, we can consider the judge or the tribunal as having an impartial interest in the search for the truth and the objective application of the law. In this case, c. 1452 grants specific legal powers in the service of the protection of the public good. In contrast, the promoter of justice, facing the disclosure of a notice of nullity of a marriage (c. 1674,2°), upon stating the demand will move toward the public interest of a declaration of nullity to end, for instance, a situation that could provoke a social scandal. The defender of the bond, on the other hand, will act with the inspiration of the legitimate interest, granted by c. 1432, of proposing and presenting all that can reasonably be put forth against the nullity of the contested marriage. The public good does not always have a single face, but rather many faces. The task of the judicial organ in such cases will be to determine which face of the public good deserves to be protected by truth and justice.

Given the specification of the favorable public good that is attributed to the defender of the bond, it is logical that, if in a specific proceeding the defender of the bond is present by mandate of the canon law in defense of a specific public interest, the same person who is titular of this office would contradict himself if exercising the office of promoter of justice. This latter office would indicate a focus on the same litigious object from an angle of the public good that is contradictory to the former.

For this reason, the formula offered by c. 1436 §1 should be praised, when on establishing the compatibility of the appointment and exercise of each office by the same person, it prescribes the incompatibility of the

same person exercising both offices in the same case. This incompatibility was not prescribed in c. 1588 §1 *CIC*/1917.

For the same reason, c. 1447 prohibits a person who has intervened as judge, promoter of justice, or defender of the bond in a particular instance from validly acting as judge in a later instance of the same case, or from carrying out the role of assessor in the same case. The procedure is a single one, although there may be different instances. Therefore, a person who adopted the specific procedural position of a party remains absolutely incapable of exercising the role of judge or assessor to the judge in a later instance, even though the judge and assessor were public parties. Further, we must see such incompatibility projected to any other office that is not the same as the one exercised in the first instance.

In the process, the objective trust must be sought. However, the process must be expounded in such a way that guarantees the truth and sincerity with which the parties act, especially the public parties. There is only one situation in which the promoter of justice or defender of the bond is not incompatible to act in two instances in the same case. This situation occurs when the promoter or defender consents to act in a superior court of appeal, in the same role and with the same procedural position, of action or opposition, as was carried out in the first instance. If the party attempted to change the procedural position in the second instance from that of the first instance, there would be reason to suspect that the party incurred cause to justify removal of the promoter of justice or defender of the bond (c. 1448).

3. The first clause of c. 1436 §2 refers to the two possible forms of being promoter of justice or defender of the bond: *ad universitatem causarum* or *ad singulas causas*. These possibilities of appointment come from what was established in c. 1588 §2 of *CIC*/1917.

Strictly speaking, only the appointment made *ad universitatem causarum* is compatible with the ecclesiastical office, which requires the requisite of stability (c. 145 §1). This requirement is not met in an appointment for *singulae causas*, although the appointment may be for various cases and these may have a long duration. In these cases, the appointments will always be dependent on the same judicial cases for which they have been named. Such appointments are subject to a resolutory condition, which would contradict the stability required of the ecclesiastical office, whose condition is permanence that at most could be conditioned on the factor of *tempus determinatum* (c. 153 §2). The actual stability of the office must correspond with a certain stability of appointment so that the public responsibilities of each office may be exercised in optimum professional competence and independence.

As Arrieta has noted, "it should be presumed that the office is conferred for an indefinite period (cf., for example, c. 522), unless a specific period is indicated in the document of conferral or in the law itself. The

document or the law could also expressly leave the determination of a period of time to the discretion of ecclesiastical authority (cf., for example, cc. 477, § 1, and 485)."[1] No limitation is determined with the prescription that the bishop appoint a promoter of justice and defender of the bond (c. 1435). Their appointments, in principle, would implicitly carry this dimension of undefined time period indicated previously. Nonetheless, as ministers of the tribunal of justice, upon whom fall public responsibilities very similar to responsibilities of judicial vicars and ecclesiastical judges in general (cc. 1451 §1, 1454, 1455 § 1, 1456, 1457), the requirements established in c. 1422 for appointments of determined time period may also apply. Such fixation of a time period in which to exercise the office is coherent with the stability that comes with the existence of the office itself. That is, it does not contradict it, as it does not contradict what is cited in c. 1422, as the stability is not contradicted with the office of pastor in those situations where the appointment for a specified period of times becomes allowable (c. 522). In addition, the provision of an ecclesiastical office for a specified period of time is considered in c. 153 §2.

Consequently, both the promoter of justice and the defender of the bond can be named indefinitely or for a specified period. In this case, by analogy, the proper canonical norm for judges would apply. But in addition, the imperative terms of the legal texts—*constituatur* of cc. 1430 and 1432, and *qui officio tenetur* of the last canon cited—refer to those appointed *ad universitatem causarum*. On the other hand, those appointed *ad singulas causas* do not fulfill the obligatory requirements of constitution of the offices prescribed by the cited cc. 1430 and 1432.

In these cases, we find ourselves with circumstantial charges do not possess stability of office, but rather are prolonged for the duration of the procedure of said cases. They are charges that can be entrusted in each place, keeping in mind the need to offer collaborations to those who are proper titulars of the ecclesiastical offices. Also, for such practical reasons as incompatibility in the same case, substitutions for illnesses, logistical impossibilities, etc., or simply because of the ecclesiastical officers' accumulation of work, it may be necessary to make attributions for specific cases to those who by law do not pertain to obligatory chart of the diocesan curia.

One bishop cannot appoint in his diocese only a promoter of justice and defender of the bond for singular cases, since this does not meet the legal requirements of cc. 1430 and 1432. He can, nonetheless, appoint a promoter of justice and defender of the bond for an undetermined period of time, or for a determined period *ad universitatem causarum*, without the need to make appointments *ad singulas causas*. The juridical duty to do this, derived from the cited canons, has been completed and the organization of the diocesan curia, for this purpose, is complete.

1. J.I. ARRIETA, commentary on c. 193, in *Pamplona Com.*

4. We said in no. 1 above that the canon considers a third phenomenon; namely, removal of established appointments. The last clause of § 2, *possunt autem ab Episcopo, iusta de causa, removeri*, is dedicated to this issue.

a) In the words of the canon, we see that the removal must come from the proper bishop. Thus, in our judgment, it is clear that the norm of c. 1590 § 1 *CIC*/1917, which anticipated, in the case of vacancy, the permanency of the appointment, is also given in the *CIC*. Consequently, when the office is vacant, the diocesan administrator cannot make the appointment for these ecclesiastical offices. The most the diocesan Administrator can do is order special charges, in the case of necessity, *ad singulas causas*. In the *CIC*, the power of removal, like the power of appointment, is reserved exclusively to the bishop. With this norm, the same treatment is maintained as that used with greater scope in the legal expression in cc. 1420 § 5 and 1422 for judicial vicars and judges.

b) Stability is given for the offices of promoter of justice and defender of the bond as well as for the charges of these functions to different persons (either clerics or laypersons) for individual cases. Removal of the offices, like appointments, falls under the jurisdiction of the bishop by authority of the law. The term *possunt* of c. 1436 § 2 refers to both offices.

What is proper for removal from ecclesiastical offices in general (c. 193 §1) applies to those designated *ad singulas causas*. For removal from ecclesiastical office, it is required by the constitution of the office itself and by the permanence of its exercise. For those designated *ad singulas causas*, it is required by the actual nature of the charge conferred, with the same functions in singular cases assigned to titulars of the offices in general, and by the nature of the procedure in which the functions are developed. All procedures must be inspired by the principle *semel partes semper partes*, which is also a guarantee, when dealing with public parties, of independent justice and respect for the constitution of the procedural relationship both as it was initiated in the instance by citation (c. 1517) and when it was later formalized by the *litis contestatio* (cc. 1513, 1661 § 1, 1677 § 3). Again we are presented with a phenomenon that maintains a certain similarity with judges and with the principle *semel iudex semper iudex* (c. 1512,2° and 3°).

c) Finally, just cause for removal must always exist. Such cause will be determined by the bishop in each case. For judges in general, c. 1422 requires legitimate and grave cause. All removals from office require just cause and must be done in accordance with procedures determined by law (c. 193 §§ 1 and 2).

Arrieta understands grave cause for removal in general to be "[a]ny of the reasons provided in c. 1741 or analogous reasons based on questions of discipline or the common good (cf. c 253, § 3 on the removal of

seminary professors)."[2] More appropriate to judicial activity, we should keep in mind infractions of the norms contained in cc. 1454–1457.

Regarding the procedure for removal of pastors, Arrieta returns to cc. 1740–1744. It appears that a proceeding of instruction is not always necessary, especially for appointments *ad singulas causas*. Nonetheless, the bishop's decree of removal must contain the justification. That is, it must contain an explanation of the just cause and the reasons for such qualification. In addition, as c. 193 § 4 expressly prescribes, the decree of removal, in order to be effective, *scripto intimandum est*. All possibilities of administrative recourse anticipated in general in the *CIC* for decrees and singular administrative acts begin when the interested party receives the notice of removal with certainty (cf. cc. 1732ff).

2. Ibid.

1437 **§ 1. Cuilibet processui intersit notarius, adeo ut nulla habeantur acta, si non fuerint ab eo subscripta.**

§ 2. Acta, quae notarii conficiunt, publicam fidem faciunt.

§ 1. A notary is to be present at every hearing, so much so that the acts are null unless signed by the notary.

§ 2. Acts drawn up by notaries constitute public proof.

SOURCES: § 1: c. 1585 § 1; *PrM* 17
§ 2: c. 1593; *PrM* 18 § 3

CROSS REFERENCES: cc. 10, 470, 483–488, 1419–1420, 1425, 1438,1°, 1439, 1454, 1457, 1459 § 1, 1472–1473, 1503 § 2, 1509, 1511, 1512, 1540 § 1, 1541, 1546 § 2, 1550 § 2,1°, 1567, 1569, 1585, 1587, 1597, 1613 § 4, 1622,5°, 1623, 1626 § 1, 1629

COMMENTARY

Carmelo de Diego-Lora

1. *The judicial notary: his functions*

a) Canon 1437 repeats at its start the first clause of c. 1585 § 1 *CIC*/1917, eliminating the words *qui actuarii oficio fungatur.* At the heart of the corresponding consultant commission, the phrase that would describe the functions of the notary as superfluous[1] was eliminated. Because in the experience of the forensic life the notary and its functions are well understood, legislative intent to define them would perhaps be useless.

From another point of view, the notary is not considered in this canon in the same ways as the promoter of justice and the defender of the bond were considered in the previous canons. This is because the notary who acts before the diocesan tribunals pertains to a broader group of ecclesiastical offices whose functions are structured in the chancellery of the curia. The notary is the one who writes acts and other public documents, records all that has taken place, signs such documents, certifies the authenticity of the documents, and dates them. The notary also indicates which are original documents and draws up certified copies of them

1. Cf. *Comm.* 10 (1978), p. 240.

(c. 484). The notary also has custody of the documents, according to the general requirements of cc. 486–488.

The qualities required of notaries are common to all notaries and to the chancellor. Their appointment corresponds to the diocesan bishop (c. 470), who may freely remove their appointment. The diocesan administrator may remove their appointment, but only with the consent of the college of consultors (c. 485; see commentary on cc. 483–485). Within the group of notarial offices existing in the diocesan curia, only the notary designated solely for judicial cases (c. 483 § 1) is of interest in this commentary. This notary exercises the general functions in the procedural actions carried out by ecclesiastical tribunals of justice (cc. 1419, 1420 y 1425), by tribunals constituted for second instance, such as metropolitan tribunals (c. 1438,1°), or by tribunals constituted for several dioceses by the episcopal conference with the approval of the Apostolic See (c. 1439).

For the Roman Rota, art. 8 *NSRR* (1994) shows us the possession of its own chancellery, in which the moderator responds to the offices integral in it. Notaries incorporated within the chancellery must hold a doctorate in canon law and a diploma with the title of Rotal attorney. Notaries must also have prior judicial experience and service. From among these notaries, one is selected to collect cases of Rotal jurisprudence and to care for his ordination and another is selected to act as librarian (art. 9). The figure of the notary is thus broken down into a series of functions that are not properly notarial. The functions that are properly notarial appear written in arts. 33–36. These articles identify tasks which are appropriated to the first, second and third notaries. The activities of conserving and cataloguing documents do not pertain to notaries, but to the archivist (arts. 10 § 1 and 37). The moderator of the chancellery is ordinarily a priest chosen from among the notaries of the tribunal (art. 8). Like other offices, he is designated through a proposition of the Dean, with a favorable vote of the Rotal college, according to the norms of the *RGCR*. The moderator appears to be ultimately responsible for the functions of all the other notaries (arts. 31 and 32).

In reference to the Signatura, *SNAS* art. 2, indicates there should be at least two notaries. Article 15 indicates some strictly notarial functions for these notaries: to give public faith to a series of procedural acts in which the notaries must be present, and to authenticate the proceedings. Notaries are named by the Cardinal Prefect, according to the norms established for the Roman Curia (art. 2).

b) The procedural canonical doctrine attempts to detail the figure of the judicial notary, indicating the special relevance attached to the exercise of the notarial function in each of the proceedings that take place before the ecclesiastical tribunal. The eloquent words of Msgr. Del Amo are worth mentioning: "The notary is the *magister actorum*, a technician for the judicial proceedings, who draws up the acts with technical skill, illustrates

them with notes, files them in order with suitable numbering and keeps them safe. The notary is the trustworthy public witness, both on behalf of the judge before the parties, and for the parties before the judge; and before the superior tribunal with regard to all that was enacted and in what manner, in the lower tribunal. He is the appropriate channel by which authentic and correct petitions reach the judge, and the unaltered decisions of the judge are transmitted to the parties, without the violation of secrecy or the loss of any document."[2] After such a masterful description, it is enough to discuss the proper canons of the current book VII and to emphasize that the succinctness regarding the notary offered in c. 1437 is compatible with many references to notarial functions expressed in different canons. We begin with c. 1437 § 2, which contains two very important precepts.

2. *Drafting of the judicial acts*

The first of these precepts is that "all judicial acts are drawn up by the notary." *Act* must be understood as the document written by the notary to put on record. The term includes both the acts of the case and the acts that express only manners of proceeding. Not only does the notary draw up the acts of the occurrences in each case, but he enumerates these acts. Each page must be incorporated in an organized manner into the documentary dossier. The dossier constitutes the original and the proof of what took place before the tribunal of justice. For this reason, the notary must mark the dossier's pages with a personal graphic sign that gives it authenticity (c. 1472).

The notary must be present from the moment of presentation of the petition, through the diligence of making an effective citation of the petition, and the appearance to answer the petition or possibly formulate some doubt. The notary's presence is required even though the wording may be omitted in the corresponding canons. His presence is necessary to draw up the appropriate act and authenticate it with his signature. In this way, all the procedural acts of the case that are produced until the declaration of a sentence are prepared. This is why, although the sentence is the act *par excellence* of the judge or the tribunal, it is not conceivable without the signature of the notary (c. 1613 § 4). The verification of the notary is necessary in the examination of witnesses (cc. 1561, 1567–1569). His verification is equally essential for the proof of judicial confession and the interrogation of the parties by the judge. The notary must present the acts of the case and other necessary documents and materials to the expert (c. 1577 § 2). The notary must be present to draw up the act when the judge receives the experts, whether it be to hear them or to ask them for

2. J. CALVO-L. DEL AMO, commentary on c.1437, in *Pamplona Com.*

necessary explanations (cc. 1577 § 3, 1578 § 3). Sometimes the *CIC* does not mention this obligatory presence of the notary in all acts of proof. Other times it makes implicit mention of it, as in c. 1583, where the canon orders the raising of the act of judicial inspection. Implicit mention also occurs in c. 1544, where the canon orders that the documents incorporated in the process have probative force when, presented in the original or authentic copy, they are also deposited in the chancellery of the tribunal.

Following this line of argument, the introduction of incidental causes and all acts of appeal to different resources achieve a judicial state in the competent tribunal serving as mediator, and of the verifying act of its introduction, of the notary of the corresponding tribunal. Regarding the objective of raising the acts of all that takes place in the proceeding, we refer, finally, to c. 1664. This canon addresses the contentious oral process, whose expressions are directed at acts that are written in summary form, giving evidence of the constant presence of the trustworthy witness.

3. *Signature of the notary and public proof*

The second precept contained in § 2 is that "the acts drawn up by the notary constitute public proof." The acts should be signed because the signature denotes the authorization of the notary. However, § 1 of c. 1437 requires, under threat of nullity of the act, the signature of the notary. Therefore, this signature also furnishes a certainty of the authority of the document and offers the guarantee of judicial public proof.

When c. 1437 states that the acts are drawn up and signed by the notary, it affirms that the notary is elaborating in each case a representative proof of the different procedural acts as they are produced. These acts are written versions that faithfully recall what has occurred. They contain the guarantee that the notary has fortified them in the exercise of his public office, whose principal function is to reproduce in writing what has occurred in the proceeding. The notary is a trustworthy witness to all that has occurred, independent of an interest in either party.

Judicial notaries sometimes are subject to the public responsibilities required of ministers of the tribunal and their assistants, as in cc. 1454–1457. Due to the independence that comes with the exercise of the notarial mission, notaries are considered incapable of giving evidence in the proceeding (c. 1550 § 2,1°). The principal function of the notary is the written transcription of the true proceedings and the authentication of what is written. This transcription and authentication, supported by the signature of the notary, is identified with the procedural act by his registry in the judicial acts. As Arroba Conde has taught, in each proceeding "the notary maintains an independent position, not only of the private or public parties, but also of the judge, making public proof of the acts of both

with impartiality. The signature is necessary for the validity of the procedural acts."[3]

Section 2 of the canon says the effect of these judicial acts, drawn up and signed by the notary, is *publicam fidem faciunt*. The acts are public ecclesiastical documents and are included fully in the concept of documents in c. 1540 § 1. They are documents in that they intentionally constitute proof of the procedural act. Secondly, they are representative documents of the actual procedural activity carried out, and as such will later serve to certify what has occurred. The documents are set up as faithful testimony to the past and formally substitute the reality that is registered in writing. Thirdly, written registration of the reality makes permanent what occurred in a transitory manner.

Regarding the probatory nature and force of the public documents, there are different works related to the documentary procedure of nullity of marriage, addressing the first of them.[4] It contains all the necessary information and is omitted here because it is outside of the limits of this commentary.

4. *Scope of judicial public proof: authenticity and genuineness of the documents*

The precept of c. 1437 § 2 must be understood, in principle, in light of c. 1541. That is, as long as no contrary and evident argument exists, public documents are drawn up and signed by the notary are proof of all that is directly and principally affirmed within them. On one hand, the documents present an assumption *iuris tantum* (c. 1585) of accuracy, and therefore truth, of the act documented. On the other hand, the favorable assumption of the document is limited, as it is restricted to what is directly and principally affirmed in the document. That is, those primary aspects of public documents, are related to the case and the purpose of its elaboration, have the presumptive favor of truth. Other secondary aspects, such as the date of birth in a certification of baptism, are not protected by the assumption.

Nonetheless, in judicial acts, the notary must record in writing all he directly perceives through his senses, in such a way that all he has witnessed is recalled in the act. Of the notices and affirmations made in the procedural act, the truths of declarations of will, etc., the notary is the trustworthy witness of all that was done in the proceeding. It does not cover, under the proof of the judicial notary, the value or the veracity of

3. M.J. ARROBA CONDE, commentary on c. 1437, in A. BENLLOC (Ed.), *Código de Derecho Canónico* (Valencia 1993), p. 635.

4. Cf. C. DE DIEGO-LORA, "Naturaleza y supuesto documental del proceso 'in casibus specialibus,'" in *Ius Canonicum* 14 (1974), pp. 252–347.

the same declarations of will with those that made such affirmations. All that occurred externally and could be perceived directly by the judicial notary, on recalling it in the act and putting it down in writing is assumed to have taken place. The judge or tribunal will, in its decision, validate such affirmations, but it will assume that everything expressed in the judicial act in fact occurred because it was recognized in the direct perception of the notary. On the other hand, determining the limits of what is perceived directly by the notary, which is the basis on which he responds, is what the notarial doctrine comes to discern. Within the body of the public document, it is what the notary qualifies as authentic.

The current *CIC* has omitted the concept of *genuineness* of the public document, a concept was included in c. 1815 *CIC*/1917. Nonetheless, a public document, like a judicial act, whichrecalls what took place before the judicial organ and remains a genuine description through the judicial notary of all that took place in his presence. All of this description has the value of genuineness, since there is commonly no mediation between the occurrence and the written verification of the notary. There is a synchrony between the realization and the verification of the act.

Nonetheless, the word *commonly* remains written intentionally. Relative to the declaration of the witness, c. 1567 § 1—a good expression of what is being said—orders that the notary immediately put in writing the replies of the witness. Section 2 of the same canon authorizes the use of a tape recorder. So as not to lose the immediacy between the declaration of the witness and the notarial verification, the canon requires that replies be put in writing as soon as possible. The writing must be signed whenever possible, not only by the notary, but also by the deponents. Thus, in spite of the use of the tape recorder, the genuineness of the act is conserved. This justifies the authenticity of all that is written by the notary, which tends to remain more emphasized with what is prescribed for the writing of the acts in c. 1569.

Further, when c. 1568 prescribes that the notary should record *et generatim de omnibus memoria dignis quae forte acciderint*, it is imposing upon the notary an obligation to make a genuine record. This avoids reducing the general authenticity of the document elaborated by the judicial notary to mere public proof of what *directe et principaliter* in the document is affirmed. Thus, authenticity extends to the whole of the judicial act. This extension of the authenticity of the judicial act is different from the non-judicial notarial act. It is important to remember that the written verification of the procedural acts is directed first to the accreditation of what is said and done in the judicial presence. That is, the totality of the procedural act is what is put at the disposal of the judge or tribunal so that, at the appropriate procedural moment, they may determine the truth of declarations of will were made during the proceedings and were verified notarially. The judge will also make the appropriate and necessary declarations regarding their significance and juridical importance.

The authenticity the intervention of the notary provides to the genuine elaboration of the procedural act allows the whole judicial act to be at once genuine and authentic. In addition, in the whole of the writing, this surpasses the limits of the assumption of c. 1541. It even overcomes the resistance of the parties and witnesses to sign the proper declarations, since public verification supplies the same force as the voluntary subscription of the interested parties (c. 1473). Strictly speaking, the acts and juridical business exist by themselves, by the fact of producing legitimate subjects. However, these acts merit, and sometimes require, that they be verified notarially in order to reach the efficacy of public proof granted in c. 1541. On the other hand, the procedural juridical acts only exist if they are part of the public verification of the acts subscribed by the notary. Without public verification, procedural acts do not really exist. The relevance of the formal element in the proceeding is discovered when considering this formal diversity in the production of the juridical acts. It sufficiently explains c. 1437 § 1 when it prescribes the nullity of the proceedings if the acts that should be verified are not signed by the notary. For genuineness, the true material is projected in the formal document. The public person who subscribes or certifies the document makes public proof of its contents before all.

5. *Considerations regarding the authenticity of the different types of copies*

Genuineness and authenticity are united in the procedural acts, drawn up and signed by the notary. The probatory power of the judicial notarial act stems from this. On the other hand, copies of the original acts, deposited in the tribunal chancellery, will be authentic (c. 1544) if subscribed by the notary. However, if the proper genuineness of the written transcription is lacking in the act itself, it will give such copies the efficacy of c. 1541. The same occurs with transcriptions ordered from the notary by the judge with respect to the original documents that are outside of the proceeding. Such transcriptions are incorporated, according to c. 1546 § 2.

There is also mention of the copies of the original acts, which must be submitted to the superior tribunal in the case of an appeal (c. 1474 § 1). Strictly speaking, in addressing such copies, the effects should be those of c. 1541. Nonetheless, the notary who acted in the prior instance must expedite these copies to ensure that the certifying function is carried out in the same procedural environment in which the originals were elaborated, even though this elaboration is completed for another superior instance. These copies are replicas of the actual proceeding took place in the inferior instance. It can be said that, through these copies, duly authenticated by the notary of the tribunal *a quo*, the tribunal *ad quem* will receive them—although the canon says nothing to this respect—with the same merit as if they were the original acts; that is, with a presumption *iuris* of

genuineness. If the veracity of one or another specific point is challenged, the copies are reconcilable in that the judge or superior tribunal can order appropriate comparisons to be made with the originals for the purpose of authorizing the accuracy of the copies. Nevertheless, if the copies expedited for appeal have not been challenged, or if they have been challenged and authenticated, the copies will cover with public judicial proof the whole of the act as addressed in the original written act. In our estimation, the limited effectiveness of public proof in c. 1541 refers not to the judicial acts, but to the notarial documents that have been either elaborated outside of the proceeding and brought as probatory instruments in relation with the intended object, or are serving to authenticate the titles of legitimacy of the litigating parties.

Finally, c. 1475 § 2 indirectly stresses that the judicial notary, as an office of the chancellery of the diocesan curia appointed only for judicial matters (c. 483 § 1), also carries out functions relating to the custody of the documents (c. 486 § 1). Further, in accordance with c. 484,3°, authentic copies of originals under the notaries' power can be drawn up *ad extra*. Given the secret nature frequently found in procedural activity and the fact that copies produce their effect outside of the proceeding itself by elaborating the original document, the power to certify, through the drawing up of copies (judicial acts), while it is a certifying task carried out by the notary—and also by the chancellor—with the further effects of c. 1541, cannot be carried out without order of the judge. The specific authorization to certify depends on such order of the judge, while the certifying function itself receives authentication by the notarial authority.

6. *Nullity of judicial acts*

The act drawn up and signed by the notary becomes public proof, according to c. 1437 § 2. However, § 1 prescribes that acts not signed by the notary are invalid.

This invalidity is expressly established, in accordance with the requirements established for nullity in c. 10. Consequently, it is advised that any of the existent parts of the act lack the signature of the notary can promote an incident of nullity of acts, according to c. 1587 and supported in c. 1437 § 1. Now, if no incidental case has been introduced and the judgment has been pronounced, when dealing with a proceeding that affects only the good of private persons, such nullity can be rectified in the judgment in accordance with c. 1619. We understand that such remedy can only be produced by the final judgment, because, while it lacks the signature, it is appropriate to submit against the null act a complaint of nullity of the judgment, together with the appeal, on the basis of c. 1622,5°.

It would also be appropriate to submit a complaint of nullity independent of the appeal if the lack of a signature of the notary is reported in a timely manner. This is always true when dealing with cases affect the

public ecclesiastical good. The time limit for submitting the complaint is three months from the time notice of the publication of judgment is presented to the parties (c. 1623).

We further understand that, if the judge before pronouncing the judgment makes note of the lack of notarial signature in the judicial act, he should declare the judgment's nullity ex officio. Since these defects of nullity are among those that can follow the nullity of the judgment, the judge can directly take the initiative of declaring nullity in any phase or level of the proceeding (c. 1459 § 1). To prudently make the proceeding ex officio, the judge should give notice to the promoter of justice to appear in person, as a necessary third party in the manner of c. 1597, and should submit the incidental case of nullity or the complaint of nullity against the judgment (c. 1626 § 1). It can be understood that the public good is at stake when the judicial acts are elaborated without the necessary notarial guarantee.

7. *Final references to couriers and "apparitores"*

The authors have noted in their comments on c. 1437 that no mention is made of the public judicial proof attributed by c. 1593 *CIC*/1917 to the couriers' and bailiffs' acts of judicial notice and execution in which, respectively, they intervene in the *CIC*/1917.

Some authors think the offices of courier and bailiff are not actually necessary. Couriers have been substituted by the public postal service or similar means (c. 1509) as a means of making citations. Other authors consider this subject to be a matter for the regulations of each tribunal. For example, Arroba Conde states, "The Code does not speak of a courier, but it does not imply that this figure of the ecclesiastical tribunal should disappear, since this office is necessary from the practical and organizational point of view (cc. 1509, 1511, 1512). His/her appointment is governed by the specific regulations of the tribunal."[5] The question remains whether one can be granted an ecclesiastical office of public faith in a regulatory manner. Perhaps the norm established by the particular law is necessary, referring us to the last terms of c. 1509 § 1.

In any case, in the *coetus* of consultors, this subject did not pass unnoticed and in session II (May 15–19, 1978) the question was resolved. The three canons existed in the old *schema* ultimately were reduced to a single canon. The figure of the courier was omitted, as it did not pertain to the reality of the ecclesiastical tribunals of our time. Thus the article in which these ecclesiastical offices were understood disappeared. In its place a single canon established the office of notary, following the canons

5. M.J. ARROBA CONDE, commentary on c. 1437, cit.

address the promoter of justice and the defender of the bond. The *CIC* addresses these three ecclesiastical offices of the diocesan justice tribunal.[6]

Nonetheless, many years later art. 12 of the *NSRR* (1994) considered that the couriers and *apparitores* are included among the offices in the tribunal. Further, art. 40, although functionally identifying the offices in a certain manner, indicated their functions in the proceedings and, as prescribed in its no. 1, certifies (*fidem facere*) in the notifications of the citations and in the acts of the tribunal, following the proper tradition and current practice.

6. Cf. *Comm.* 10 (1978), pp. 240–241.

CAPUT II
De tribunali secundoe instantioe

CHAPTER II
The Tribunals of Second Instance

1438 **Firmo praescripto can. 1444 § 1, n. 1:**

1° a tribunali Episcopi suffraganei appellatur ad tribunal Metropolitae, salvo praescripto can. 1439;

2° in causis in prima instantia pertractatis coram Metropolita fit appellatio ad tribunal quod ipse, probante Sede Apostolica, stabiliter designaverit;

3° pro causis coram Superiore provinciali actis tribunal secundae instantiae est penes supremum Moderatorem; pro causis actis coram Abbate locali, penes Abbatem superiorem congregationis monasticae.

Without prejudice to the provision of Can. 1444 § 1 n. 1:

1° an appeal from the tribunal of a suffragan Bishop is to the tribunal of the Metropolitan, without prejudice to the provisions of Can. 1439;

2° in cases heard at first instance in the tribunal of the Metropolitan, the appeal is to a tribunal which the Metropolitan, with the approval of the Apostolic See, has designated in a stable fashion;

3° for cases dealt with before a provincial Superior, the tribunal of second instance is that of the supreme Moderator; for cases heard before the local Abbot, the second instance court is that of the Abbot superior of the monastic congregation.

SOURCES: c. 1594 §§ 1, 2 et 4; *CD* 40; *ES* I, 42

CROSS REFERENCES: cc. 431, 1419, 1423, 1427, 1439, 1440, 1444

COMMENTARY

Miguel Ángel Ortiz

Functional competency comes from the proper configuration of the canonical procedural system, which is articulated in a manner similar to the solution generally adopted in the civil scope,[1] with attention to human fallibility and around a multiplicity of instances. In effect, the multiplicity of instances is one of the constitutive principles of the canonical process.[2]

Our procedural system involves diverse tribunals, hierarchically organized and with a relationship of subordination in terms of the tribunals' stability and in terms of the revision of decisions of inferior tribunals by superior tribunals. Such subordination is not of a disciplinary or administrative nature, since each tribunal enjoys total autonomy and independence derived from the authority of the bishop or ordinary, respectively.[3] The judicial independence acts in such a way that the superior tribunal, even when it issues a sentence contradicts that of the inferior court, does not modify the valid decision of the first instance. Two sentences will exist without the second altering the content of the first, whose content was determined by the judges of the first tribunal. This independence also refers to the relationship of the tribunal with the proper ordinary and the judicial vicar (cf. cc. 1422 and 1425 § 5). On the other hand, the possibility of imposing sanctions on the judges (cf. c. 1457 § 1) does not involve any interference in their decisions. Their decisions are only contestable before the competent tribunal. The stability of the sentence determines one of the fundamental differences between the exercise of judicial and administrative powers. The act of the superior administrative organ can modify the act of the inferior (cf. c. 1739). On the other hand, the sentence of the superior tribunal can disagree with that of the inferior, but cannot make the challenged sentence say something different from what the judges in this previous level decided. The issue is of extreme importance for cases in which the execution of the sentence requires two conforming decisions (cf. c. 1684). If the second decision does not agree with the first, a decision from a third instance is required. The third decision must conform to one of the prior decisions.[4]

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1. For example, A. DE LA OLIVA-M.A. FERNÁNDEZ, *Derecho Procesal Civil*, II (Madrid 1990), p. 200.
2. Regarding the ecclesiological basis of that functional hierarchization, cf. J. LLOBELL, "Centralizzazione normativa processuale e modifica dei titoli di competenza nelle cause di nullità matrimoniale," in *Ius Ecclesiae* 3 (1991), p. 436.
3. Cf. M.J. ARROBA CONDE, *Diritto processuale canonico* (Rome 1993), p. 125; P.A. BONNET, "I tribunali nella loro diversità di grado e di specie," in P.A. BONNET-C. GULLO (Eds.), *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), p. 187.
4. Regarding the concept of conformity, see commentary on the title "Matrimonial Processes."

The principle of multiplicity of instances is founded in the hierarchy that, in its initial formulation, runs parallel to the ecclesiastical organization. However, sometimes, the tribunal of a diocese or of a metropolitan can revise the decision of the tribunal of another diocese or archdiocese.

Canons 1438 and 1439 establish the competent tribunal to make known in the second instance. If the appeal does not state the tribunal before which it will be heard, it is presumed that the tribunal will correspond to the canons of this chapter (cf. cc. 1440 and 1632).

But, the possibility of elevating the appeal to the Holy See of cases decided by ordinary tribunals of first instance should be kept in mind, as underlined by c. 1438 in its reference to "the provisions in c. 1444 § 1,1°". The Roman Rota will judge this appeal (cf. *PB* 128,1°). Thus, it will be competent in the second instance for ordinary tribunals in the first instance and elevated to the Holy See for legitimate appeal (interposed before the judge who presided in the first instance, as in c. 1630 § 1). Upon notifying the parties of the decision, the tribunal makes this possibility available to them (cf. c. 1614).[5] Canon 1444 § 2 *in fine* also recognizes the competence of the Rota to receive appeals in two other situations. Unless the rescript of commission determines something different, these include cases dictated by the Rota in the first instance, in application of c. 1405 § 3, and cases the Roman Pontiff would have received in his tribunal and charged to the Rota. In this way, the Rota shows a competency concurrent with the peripheral tribunals (if one party appeals to the corresponding local tribunal and the other appeals to the Rota) that is resolved in favor of the apostolic tribunal. Although c. 1632 § 2 excludes what is set forth in c. 1415, if the conflict is between the apostolic tribunal and an inferior one, the application of c. 1417 § 2 resolves the issue in favor of the Rota. If there is an appeal, the jurisdiction of the judge who began the case should be suspended.[6]

The Roman Pontiff can also resolve cases he reserves to himself and are not committed to the Rota (cc. 1417 § 1 and 1442). He may also resolve cases through judges assigned by him. In both situations, these decisions issued in first instance cannot be appealed, as established in c. 1629,1° (also c. 333 § 3). Canon 1629,1° also excludes the appeal of decisions of the Apostolic Signatura, although it does not appear to absolutely exclude any revision of these decisions.[7]

5. The Apostolic Signature should remind the outlying tribunals of that obligation with a certain frequency: cf. Z. GROCHOLEWSKI, *De ordinatione ac munere tribunalium in Ecclesia ratione quoque habita iustitiae administrativae*, in *Ephemerides Iuris Canonici* 48 (1992), p. 63.

6. See commentaries on cc. 1415 and 1417. Cf. sentence *coram* POMPEDDA, December 14, 1992, in *Ius Ecclesiae* 5 (1993), pp. 597–602, and the commentary of J. LLOBELL, "La necessità della doppia sentenza conforme e l'*appello automatico* ex can. 1682 costituiscono un gravame? Sul diritto di appello presso la Rota Romana," in *Ius Ecclesiae* 5 (1993), pp. 602–609.

Bringing into this point the sense of c. 1594 § 1 *CIC*/1917, c. 1438,1° establishes that the ordinary tribunal recognizes appeals of the diocesan tribunals (c. 1419) is the metropolitan tribunal. If, in first instance, an inter-diocesan tribunal selected according to c. 1423 judged the case, the appeal will follow the course indicated in c. 1439. Number 1° of c. 1438 addresses the case in the decision of a tribunal of a suffragan diocese is being appealed. Number 2° considers an appeal against a decision issued in first instance by the metropolitan tribunal.

The metropolitan tribunal is the same tribunal that is competent in first instance to judge cases presented in the metropolitan diocese. The decision issued in first instance by the metropolitan tribunal should be appealed before another tribunal. Canon 1438,2° establishes that this will be the tribunal the metropolitan diocese "has designated in stable fashion, with approval of the Apostolic See". Canon. 1594 § 2 *CIC*/1917 anticipated that the appeal would be made "to the local ordinary that the Metropolitan had permanently designated with approval of the Apostolic See."

Approval of the local ordinary's designation corresponds to the Apostolic See (*PB* 124,4°). Until 1988, unless mediated by the creation of an interdiocesan tribunal, the SCB, the SCEC and the SCEP carried out this approval.[8] The intervention of the Supreme Tribunal is the logical consequence of its competency as "Congregations of Justice."[9] Ordinarily, the designation will be to the tribunal of another metropolitan diocese, that of some suffragan diocese in the same province (for example, the tribunal of Trnava designated Nitra, its suffragan[10]) or even an interdiocesan tribunal (for example, the appeals tribunal for the metropolitan of Olomuc is the interdiocesan tribunal of Prague[11]). When the Apostolic Signatura concedes its approval, the consent of the tribunal the metropolitan wishes to designate is also required.

Canon 1438,3° establishes the tribunal of second instance for religious: "for cases dealt with before a provincial superior, the tribunal of second instance is that of the supreme moderator; for cases heard before the local abbot, the second instance court is that of the abbot superior of the monastic congregation."[12] In a case between religious of different institutions or between a religious and a non-religious (c. 1427 § 3) heard by

7. See introduction to the title "The Competent Forum" and *SNAS*, aa. 58, 77 and 82; cf. J. LLOBELL, "Note sull'impugnabilità delle decisioni della Segnatura Apostolica," in *Ius Ecclesiae* 5 (1993), pp. 675–698.

8. Cf. Z. GROCHOLEWSKI, "I Tribunali," in *La Curia Romana* (Vatican City 1990), p. 413.

9. See commentary on 1445.

10. Cf. Signatura, Decr., July 31, 1991, prot. no. 4047/91 SAT; the information is taken from Z. GROCHOLEWSKI, "De ordinatione ac munere tribunalium..." cit., p. 50.

11. Cf. Signatura, Decr., November 19, 1990, prot. no. 4042/90 SAT.

12. See commentary on c. 1427. Regarding the matter, X. OCHOA, "Ordinatio tribunalium religiosorum iuxta vigentem disciplinam," in *Commentarium pro religiosis* 63 (1982), pp. 3–21 and 64 (1983), pp. 124–141; especially, pp. 138–140.

a secular tribunal in first instance, the appeal follows the corresponding path. The canon does not take into consideration cases decided in first instance by the supreme moderator of the institution or of the superior abbot of the monastic congregation (c. 1427 § 2). The second instance will be judged in a superior tribunal; namely, the Rota or another tribunal determined in the constitutions, with approval of the Holy See.[13] It is appropriate to consider whether a tribunal pertaining to the same institution or congregation can hear a second instance case. Although the general rule of appeal requires that an independent organ hear the second instance, the possibility that the superior tribunal be part of the institution or congregation could be defended, given the peculiar nature of the appeal. This section admits that the supreme moderator or the superior abbot can receive the appeal in cases heard before provincial superiors or local abbots.

Paragraph 3 of c. 1594 *CIC*/1917 addressed which tribunal should hear appeals of cases heard in first instance before an archbishop without suffragans or a local ordinary immediately subject to the Holy See. These cases should be appealed before the tribunal of the metropolitan discussed in c. 285 *CIC*/1917. *Christus Dominus* 40 eliminated *pro regula* dioceses directly subject to the Apostolic See. *ES* I, 4 referred its application to the bishops' conferences and c. 431 has recalled the provision of *Christus Dominus* 40, which stated that as a general rule, free dioceses do not exist. The revision of c. 1594 *CIC*/1917 consequently eliminated the reference to these cases *cum in novo Codice figura Metropolitae sine suffraganeis suppressa erit et non amplius erunt Episcopi dioecesani immediate Sedi Apostolicae subiecti.*[14] Yet there are exceptions to the general rule, since the prohibition is not absolute. The Signatura must determine the tribunal of appeal in such cases, with procedures similar to those followed in metropolitan tribunals.[15]

Canon 1438,2° has also been used to determine the tribunal of second instance of personal circumscriptions. This has been done by Art. XIV of SMC,[16] as well as by the Apostolic Signatura when approving the appeals tribunal of the tribunal of the Opus Dei Prelature.[17] The pastors of these circumscriptions do not necessarily have to erect a proper tribunal of the circumscriptions, because the faithful of the circumscriptions are "also members of the particular churches in which they live and work."[18] If the ordinariate lacks the proper judicial organization, the tribunal of the

13. Cf. L. CHIAPPETTA, *Il Codice di Diritto Canonico* (Naples 1988), no. 4684.
14. *Comm.* 10 (1978), p. 242.
15. Cf. Z. GROCHOLEWSKI, "I Tribunali..." cit., p. 413; idem "De ordinatione ac munere tribunalium..." cit., p. 50; F. GIL DE LAS HERAS, "Organización judicial de la Iglesia en el nuevo Código," in *Ius Canonicum* 24 (1984), p. 138.
16. See commentary on c. 1419; cf. A. VIANA, *Territorialidad y personalidad en la organización eclesiástica. El caso de los ordinariatos militares* (Pamplona 1992), pp. 226ff.
17. Cf. STSA, Decr., 15.I.1996, prot. n. 4419/1/96 SAT.
18. Cf. CDF, Carta *Communis notio*, 16.

diocese where the ordinariate has its curial see will be the competent tribunal. In such a case, "the statutes will permanently designate the tribunal of appeal" (*SMC*, a. XIV). If, on the other hand, the ordinariate has its own tribunal, "appeals will be carried to the tribunal permanently designated by the same military Ordinariate, with prior approval of the Apostolic See" (*SMC*, a. XIV). It falls to the Signatura to give this approval. In the same way that the military ordinary cannot choose the tribunal of first instance if it lacks its own tribunal, without the corresponding *ex lege* of the diocese where the curia has its domicile, neither can it freely determine the tribunal of the second instance, since such tribunal should be established in the statutes.

Most ordinariates lack their own tribunal of first instance.[19] Although the *SMC* says nothing concerning the need for approval of the Holy See to create a tribunal of first instance, the approval requirement guarantees the need for permission. It does not appear that the tribunal of second instance can be part of the judicial organization of the ordinariate itself, in the same way that the bishop does not have authority to establish a tribunal of appeal in the diocese. Article XIV of the *SMC* prohibits this upon accepting c. 1438,2°. Thus, as opposed to the current criterion in the appeal of tribunals of religious (that can be resolved in the same institution or congregation), the decision of first instance of the tribunal of the ordinariate should be appealed *ex novo et integro* before judges of another ecclesiastical jurisdiction in the same nation as the ordinariate.[20]

The nonexistence of a diocesan tribunal of appeal for cases of the diocese itself emphasizes the disappearance of all tribunals of first instance inferior to the diocesan bishop, whose decisions can be appealed before the tribunal of the bishop.[21] The *CIC* also does not recall the possibility of delegated tribunals. It omits all reference to the competent tribunal in second instance in these cases. The bishop can delegate the judicial authority; the judge cannot (c. 135 § 3).[22] Also, the general superior can judge through a delegate (c. 1427 § 2). Upon reviewing the rule, one consultant proposed that the lake be filled, and made some mention of these delegated tribunals. In order to avoid even the image of the lake, it was agreed to eliminate from the wording of the pertinent chapters the expression "ordinary." Thus, as opposed to the tenor of the *CIC*/1917, the current *CIC* speaks of the tribunal of first and second instance and of

19. Cf. E. BAURA, *Legislazione sugli ordinariati castrensi* (Milan 1992), p. 34; idem "L'ufficio di Ordinario militare. Profili giuridici," in *Ius Ecclesiae* 4 (1992), pp. 408ff.

20. Cf. A. VIANA, *Territorialidad y personalidad...*, cit., pp. 228ff. To the contrary, cf. J. BEYER, "Quelques notes et indications pour la nouvelle rédaction des Statuts des Ordinariats militaires," in *Militum Cura Pastoralis* 1 (1987–2), p. 27; idem "Les Tribunaux de l'Ordinariat militaire," in *Militum Cura Pastoralis* 2 (1988–2), p. 56.

21. See above, the commentary on tit. I, part. I of book VII, no. 5.

22. Cf. J.M. PINTO, "La giurisdizione," in P.A. BONNET-C. GULLO (Eds.), *Il processo matrimoniale canonico*, cit., p. 127.

tribunals of the Apostolic See.[23] In any case, regarding the second instance of the possible delegated tribunal, the judicial power of the bishop is exhausted with the decision of the tribunal, vicariate, or delegate (cf. c. 1419). The appeal should be proposed before the respective tribunal of appeal.

In Spain, the criteria sanctioned in these canons regarding the determination of the tribunal of second instance are weakened in view of the competency of the Rota of the Nunciature of Madrid to hear in the second instance cases that were judged in first instance by any Spanish metropolitan tribunal or by any tribunal immediately subject to the Apostolic See.[24] The Nunciature of Madrid also hears cases in second instance, in particular (fulfilling the requirements of a. 37 3 of the cited rule, "petition of the parties and approval of the Metropolitan"), matrimonial cases the Nuncio presents to it and were judged in first instance by suffragan tribunals. (In addition to these cases, the Rota of the Nunciature hears in first instance cases conferred to the Nuncio by petition of any Spanish bishop (a. 37, 2.) The Nunciature also hears those cases judged in the second instance by a metropolitan tribunal, by an inter-diocesan tribunal of the second instance, or by the same Spanish Rota. Nevertheless, either party may take directly to the Roman Rota cases heard in the first or subsequent instance by an ecclesiastical tribunal in Spain. If one of the parties should appeal to the Roman Rota and the other to the Rota of the Nunciature, the Roman Rota will hear the case (Art. 38).

23. Cf. *Comm.* 10 (1978), pp. 244ff.

24. Cf. a. 37, 1, a) of the M.P. *Nuntiaturae Apostolicae in Hispania,* October 2, 1999, en AAS 92 (2000), pp. 5-17. Regarding the national tribunals of third instance, see commentary on 1444. The Holy See tends to avoid those exceptions: cf. Z. GROCHOLEWSKI, "De ordinatione ac munere tribunalium..." cit., p. 55.

1439 **§ 1. Si quod tribunal primae instantiae unicum pro pluribus dioecesibus, ad normam can. 1423, constitutum sit, Episcoporum conferentia debet tribunal secundae instantiae, probante Sede Apostolica, constituere, nisi dioeceses sint omnes eiusdem archidioecesis suffraganeae.**

§ 2. Episcoporum conferentia potest, probante Sede Apostolica, unum vel plura tribunalia secundae instantiae constituere, etiam praeter casus de quibus in § 1.

§ 3. Quod attinet ad tribunalia secundae instantiae, de quibus in §§ 1–2, Episcoporum conferentia vel Episcopus ab ea designatus omnes habent potestates, quae Episcopo dioecesano competunt circa suum tribunal.

§ 1. If a single tribunal of first instance has been constituted for several dioceses, in accordance with the norm of Can. 1423, the Bishops' Conference must, with the approval of the Apostolic See, constitute a tribunal of second instance, unless the dioceses are all suffragans of the same archdiocese.

§ 2. Even apart from the cases mentioned in § 1, the Bishops' Conference can, with the approval of the Apostolic See, constitute one or more tribunals of second instance.

§ 3. In respect of the second instance tribunals mentioned in §§ 1–2, the Bishops' Conference, or the Bishop designated by it, has all the powers that belong to a diocesan Bishop in respect of his own tribunal.

SOURCES: § 1: PIUS PP. XI, m. p. *Qua cura*, 8 aug. 1938, II (*AAS* 30 [1938] 410–413); SCDS Decr. *Excellentissimi Ordinarii*, 20 dec. 1940 (*AAS* 33 [1941] 363–364); SCDS Decr. *Per decretum*, 25 mar. 1952 (*AAS* 44 [1952] 281–282); SCDS Decr. *Excellentissimi Ordinarii*, 31 dec. 1956 (*AAS* 49 [1957] 163–169); *REU* 105; Signatura Normae, 28 dec. 1970, 2 § 1 (*AAS* 63 [1971] 486–488); Signatura Rescr., 2 ian. 1971
§ 2: Signatura Normae, 28 dec. 1970, 2 § 3 (*AAS* 63 [1971] 486–488)
§ 3: Signatura Normae, 28 dec. 1970, 4 (*AAS* 63 [1971] 486–488)

CROSS REFERENCES: cc. 431, 433, 1423, 1438, 1444, 1445, 1632, 1653

COMMENTARY

Miguel Ángel Ortiz

This canon is an exception to the ordinary system of assigning tribunals of second instance outlined in c. 1438. Along with the introduction of interdiocesan tribunals of first instance (cf. c. 1423 and commentary), c. 1439 determines the corresponding appeal tribunals.[1] According to the first paragraph, there are three possibilities:

a) The interdiocesan tribunal of first instance unites several dioceses pertaining to the same ecclesiastical province, excluding the metropolitan diocese. The metropolitan tribunal is the tribunal of appeal, since it will be so for each of the tribunals of the dioceses that form the interdiocesan tribunal. It is not necessary that the interdiocesan tribunal include all the suffragan dioceses of the metropolitan diocese. It is sufficient that all the dioceses that make up the interdiocesan tribunal pertain to the same province.

b) If the metropolitan diocese is included among the dioceses pertaining to the same province, appeals will be made before the tribunal that the episcopal conference has established in a stable manner, with approval of the Apostolic See. That is, a tribunal set up in a stable manner by the metropolitan diocese will not receive appeals, according to c. 1438. Rather, appeals will be heard by the interdiocesan tribunal established by the episcopal conference, according to the rule of c. 1439.

c) The same solution will be followed when dealing with dioceses of different ecclesiastical provinces, even though none of the dioceses is of a metropolitan diocese.

As a general rule, when an interdiocesan tribunal consists of dioceses from different provinces or an interdiocesan tribunal includes the metropolitan diocese, hears a case of first instance, the bishops' conference *should* establish an interdiocesan tribunal of second instance. This rule allows exceptions; for example, the decree of constitution of the interdiocesan tribunal of Prague established the metropolitan of Olomuc as a tribunal of appeal.[2] In addition to those cases of obligatory constitution, § 2 establishes that the episcopal conference *can* constitute one or more tribunals when it considers it appropriate and with the approval of the

1. For any matter regarding interdiocesan tribunals, consult C. ZAGGIA, "I Tribunali interdiocesani o regionali nella vita della Chiesa," in Z. GROCHOLEWSKI-V. CÁRCEL-ORTÍ (Eds.), *Dilexit Iustitiam. Studia in honorem Aurelii Card. Sabattani* (Vatican City 1984), pp. 119–153.

2. Cf. Signatura, Decr., March 11, 1982, prot. no. 13029/81; Z. GROCHOLEWSKI, "De ordinatione ac munere tribunalium in Ecclesia ratione quoque habita iustitiae administrativae," in *Ephemerides Iuris canonici* 48 (1992), p. 53.

Apostolic See. The canon definitively contains a remission of the particular law in matters have accessory importance, affect organizational aspects[3], and specify the approval of the Holy See.

In effect, in a manner similar to the designation of stable tribunals established in c. 1438, approval of the constitution of interdiocesan tribunals of second instance falls to the Apostolic Signatura. This was anticipated in the *REU* (a. 105) and recalled in the a. 18,6° of the *SNAS* and in a. 2 § 1 of the 1970 norms of the Apostolic Signatura regarding interdiocesan tribunals.[4] Similarly, c. 1445 § 3,3° and *Pastor Bonus* 124,4° determined that the Signatura was competent "to promote and approve the constitution of the tribunals to which cc. 1423 and 1439 refer" (see commentary on c. 1445).

The distinct formula contained with the *CIC* with respect to the 1970 norms is notable. The norms anticipated a double participation of the Signatura: to concede *nihil obstat* to the petition of the bishops who wished to establish the tribunal and to approve the decree of constitution (a. 2 § 1: "the Bishops involved, after requesting and receiving the *nihil obstat* of the Supreme Tribunal of the Apostolic Signatura, must expedite the decree of constitution, which, nonetheless, does not produce its effect until after the approval of the Holy See"). Canon 1439 only establishes the need to constitute with the approval of the Apostolic See. Finally, c. 1445 § 3,3° and a. 124,4° of *Pastor Bonus* determine that it falls to the Signatura to promote and approve the constitution of interdiocesan tribunals.

According to the norm and current practice, the initiative of constitution will normally correspond to the interested dioceses (according to Grocholewski, it is a consequence of the conciliar doctrine regarding the authority of bishops[5]), although the Holy See can establish them by its own authority. Yet, in the elaboratory phase of c. 1445, the authority of the Signatura was positively reduced, in such a way that the spontaneous constitution of such tribunals by the Supreme Tribunal would remain outside of the norm.[6] Secondly, the bishops who attempt to create the interdiocesan tribunal will specify the *nihil obstat* of the Signatura. Finally, the approval of the decree of constitution by the Apostolic Signatura is required. Although c. 1439 does not contain an invalidating clause similar to that found in the 1970 norms, one author holds that the intervention of the Signatura is a requirement for the validity of the decree of constitution.[7] In any case, while the authority of the interdiocesan tribunal of first instance

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3. Cf. J. LLOBELL, "Centralizzazione normativa processuale e modifica dei titoli di competenza nelle cause di nullità matrimoniale," in *Ius Ecclesiae* 3 (1991), p. 441.
4. Cf. *Normae pro Tribunalibus interdioecesanis vel regionalibus aut interregionalibus*, December 28, 1970, in *AAS* 63 (1971), pp. 486–492.
5. Cf. Z. GROCHOLEWSKI, "De ordinatione ac munere tribunalium...," cit., p. 52.
6. Cf. *Comm.* 16 (1984), pp. 59ff; see commentary on 1445.
7. Cf. C. ZAGGIA, "I Tribunali interdiocesani...," cit., p. 144, with support at c. 455 § 2; cfr asimismo Z. GROPCHOLEWSKI, *De ordinatione ac munere tribunalium...*, cit.

arises from the bishops who create it (and not from the approval of the Apostolic Signatura), the authority of the inter-diocesan tribunals of second instance comes from the Roman Pontiff.

The inter-diocesan tribunal of second instance, according to the text of c. 1439, must be constituted if there is an inter-diocesan tribunal of first instance made up of several dioceses of different ecclesiastical provinces, or even of the same province if they include the metropolitan diocese. Paragraph 2 of the same canon indicates that, "even apart from the cases mentioned in § 1," the bishops' conference *can* constitute one or more tribunals with approval of the Apostolic See. Thus, even though there are no inter-diocesan tribunals of first instance (that is, the first grade is always resolved at the diocesan level) or even though all the dioceses are suffragans of the same province, the bishops' conference could constitute inter-diocesan tribunals. In this way, a forum would be established between the tribunal of the bishops' conference— could be a tribunal only of appeals, unless an already constituted tribunal is chosen—and that of the metropolitan tribunal[8] (and other inter-diocesan tribunals of § 1 of this canon). This will be resolved according to the rules established in c. 1415 (cf. c. 1632 § 2).

The possibility addressed in § 2 makes protagonists of the metropolitan tribunals (to whom it corresponds to receive the appeal of the interested diocese according to c.1438). This caused some reluctance among the editors of the text.[9] Unlike the canon studied here, in the constitution of inter-diocesan tribunals of first instance no intervention of the bishops' conference is anticipated, since the initiative of constitution falls to the interested bishops. In the case of tribunals of second instance, on the other hand, the conference exercises an authority that is of interest to the metropolitan diocese. One consultant asked, in the meeting of May 15, 1978, with what authority the bishops' conference would constitute such tribunals, if the canon (addressing c. 40 of the *schema*) "*nulla fit mentio approbationis S. Sedis.*" The other consultants at that meeting thought the authority of the conference came specifically "*iure Codicis, qui a Summo Pontifice promulgabitur.*"[10] Yet, later the clause *probante Sede Apostolica* was introduced, a clause not found in the 1976 *Schema.*[11] Until the later revision to the *Relatio* of 1981, it was understood that the bishops' conference and the Signatura could constitute interdiocesan tribunals. In the definitive wording, the norm indicated with some exceptions that the conference would constitute interdiocesan tribunals, with the approval of the Apostolic Signatura.

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8. Cf. M.J. ARROBA, *Diritto processuale canonico* (Rome 1993), p. 131.
9. Cf. *Comm.* 10 (1978), p. 243; P.V. PINTO, *I processi nel Codice di Diritto Canonico. Commento sistematico al Liber VII* (Vatican City 1993), p. 129.
10. Cf. *Comm.* 10 (1978), p. 243.
11. Cf. *Comm.* 16 (1984), p. 60.

An interdiocesan tribunal can be constituted for all cases or for some types of cases (c. 1423 § 2). In the second situation, incompetence (material) regarding the excluded matters is absolute (cf. c. 1620,1°). The first decrees of constitution, according to the Italian example, reserved this competency to matrimonial cases. However, this competency has been progressively extended not only to the same interdiocesan tribunals, but also to the universality of cases entrusted to them.[12] Interdiocesan tribunals of second instance hear the same type of cases as those for which they were constituted in first instance. Nonetheless, it is possible that a tribunal of first instance was constituted only for matrimonial cases to remit its decisions to an inter-diocesan tribunal of second instance is able to hear all types of cases sent by other tribunals of first instance constituted to judge all types of cases. On the other hand, the tribunal of a diocese that hears all cases not submitted to the inter-diocesan tribunal will continue sending appeals to the corresponding tribunal according to the rules of c. 1438.

We have alluded above to the Italian model of inter-diocesan tribunals. In effect, the first tribunals in Italy are elevated, with the M.P. *Qua cura* of December 8, 1938,[13] to judge in first instance cases of nullity of marriage. The M.P. also anticipates competent tribunals of appeal. Since pontifical reserve was necessary for the constitution of these tribunals, it was defended in the doctrine that the Italian diocesan tribunals were absolutely incompetent *ratione materiae* to judge matrimonial cases in first instance. But, in light of the conciliar doctrine concerning episcopal authority and through the reform of the code (since c. 1423 anticipated that the bishops themselves constitute the inter-diocesan tribunals), pontifical reserve can be understood as unnecessary and the consequent incompetence of the tribunals eliminated.[14] In this regard, we should highlight the Italian bishops' ability not only to personally judge matrimonial causes, but also to abandon the regional tribunals and entrust matrimonial causes to their diocesan tribunals. This would involve modifying the method for determining the appeals tribunal, a determination which would be established according to the criteria of c. 1438._

In spite of being repeatedly proposed during the elaboration of the norms that occupy us here, the possibility of forming regional (and national) tribunals of third instance, in a way similar to the solution then practiced in some countries, was not generally admitted. The possibility was rejected in this way, "*evacuaretur tribunal Apostolicum, per quod*

12. Cf. P. MONETA, *La giustizia nella Chiesa* (Bologna 1993), p. 45; Z. GROCHOLEWSKI, "De ordinatione ac munere tribunalium...," cit., pp. 51ff.
13. Cf. *AAS* 30 (1938), pp. 410–413.
14. Cf. J. LLOBELL, "Centralizzazione normativa processuale...," cit., p. 464.

assequitur bonum non parvi momenti scilicet uniformitas iurisprudentiae pro tota Ecclesia."[15]

Paragraph 3 of the canon, finally, establishes that, with respect to the tribunals of second instance addressed in the previous paragraphs, "Bishops' Conference, or the Bishop designated by it, has all the powers that belong to a diocesan Bishop in respect of his own tribunal." Paragraph 3 addresses a disposition parallel to what is contained in c. 1423 § 1. This canon speaks of the *Episcoporum coetus vel Episcopus ab eisdem designatus*. Canon 1439 § 3 speaks of the *Episcoporum conferentia vel Episcopus ab ea designatus*. Article 4 of the norms of 1970 established that the moderator of the inter-diocesan tribunal must be "the diocesan Bishop of the place in which it is situated or, if the episcopal see is vacant, of the most senior Bishop with respect to circumscription". This norm is no longer mandatory, although it is still customary practice to designate a moderator of the tribunal from among the diocesan bishops, primarily of the place in which the tribunal headquarters are located.[16] It is advisable that this designation be specifically determined in the decree of constitution. The decree of constitution will include the inter-diocesan tribunal of appeal, which will be common for several inter-diocesan tribunals of first instance.

Paragraph 3 of the current canon is also mentioned in c. 1653 § 2, which determines that if the bishop of the diocese in which the decision of the first instance was dictated fails to execute the decision or is found to be negligent, the execution corresponds to the authority to which the appeal tribunal is subject in accordance with the current c. 1439 § 3.

15. Cf. *Comm.* 10 (1978), p. 243; ibid. 16 (1984), p. 59; see commentary on 1444; one can consult, contrary to the adopted solution, J.J. GARCÍA FAÍLDE, *Nuevo derecho procesal canónico* (Salamanca 1992), p. 71.

16. Cf. Z. GROCHOLEWSKI, "De ordinatione ac munere tribunalium...," cit., p. 52; C. ZAGGIA, "I Tribunali interdiocesani...," cit., p. 145, with reference to the different offices of the Curia.

1440 **Si competentia ratione gradus, ad normam cann. 1438 et 1439 non servetur, incompetentia iudicis est absoluta.**

If competence by reason of the grade of trial, in accordance with the provisions of cann. 1438 and 1439, is not observed, then the non-competence of the judge is absolute.

SOURCES: —

CROSS-REFERENCES: cc. 1415, 1438–1439, 1445, 1620, 1632

COMMENTARY

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The *CIC*/1917 did not contain a norm establishing that the criteria for attributing competence by reason of the grade of trial bestow absolute competence (*functional* competence, also bestowed by reason of prevention: cf. c. 1415). This *vertical* competence is fixed automatically. Once the first instance has begun, the hierarchical line of superior tribunals is determined by cc. 1438–1439, and a change of line produces the absolute non-competence of the tribunal.[1]

Functionally, there is total centralization in the Church regarding the second and higher instances.[2] This is because all appeal tribunals receive their competence from the Roman Pontiff through the prescriptions of the code, particularly cc. 1438 and 1439. Moreover, the Rota is the universal tribunal of appeal (c. 1444 § 1,1° and *PB* 128,1°), even for the Eastern Churches, by virtue of the remission made in c. 1062 § 4 *CCEO* to c. 1059 *CCEO* (arts. 58 § 2 and 128,1° *PB*). Finally, all faithful can turn to the Roman Pontiff in any stage or grade of trial.[3]

The criteria contained in the canons of this title proceed from requirements consubstantial with the constitutive principles of process; namely, judicial independence, multiplicity of instances, and right of defense. The functional competence reflected in these principles proceeds from the dynamic characteristic of process, and violation of the principles carries with it irremediable nullity of the judgment (cf. c. 1620,1°). The basic consequence is that every tribunal is absolutely non-competent to

1. J.L. ACEBAL, commentary on c. 1440, in *Salamanca Com.*
2. Cf. J. LLOBELL, "Centralizzazione normativa processuale e modifica dei titoli di competenza nelle cause di nullità matrimoniale," in *Ius Ecclesiae* 3 (1991), pp. 436ff.
3. Cf. cc. 1417 and 1444 § 2; arts. 13, 124,2° and 129 § 1,4° *PB*; c. 1059 *CCEO*.

hear cases at a grade other than that which corresponds to the tribunal. The irremediable nullity carried by a judgment of second grade issued by a tribunal of first instance requires that the judge declare himself non-competent (cf. c. 1461), and allows the parties to propose exceptions of non-competence at any stage or grade of trial (c. 1459). Although the *CIC*/1917 did not contain any norm that sanctioned as absolute the competence due to the instance, canonists (following the German doctrine of the nineteenth century[4]) based the obligation of the functional competence *ex natura rei*.

Absolute non-competence because of the grade also affects superior tribunals, which cannot judge cases for which inferior tribunals are competent.[5] For this reason, the Roman Rota is also absolutely non-competent to judge at the first instance—apart from the cases established in c. 1405 § 3—and should receive from the Signatura no longer the "extension of competence" but the "commission". An exception to this rule is in the phenomenon of Art. 52 of the *Normae Tribunalis Romanae Rotae* of 18 Abril 1994, which contemplates, among the powers of the Deacon of the Rota, taking over a case at the first instance "*quoties peculiaria adiuncta sive locorum sive personarum propter bonum animarum idipsum urgeant*".[6] After the revision of May 21, 1997, the deacon can take over such causes at the first instance not only *auditis duobus antiquioribus Auditoribus* (as provided in Art. 52 of the Normas of 1994), but also at his discretion and at the request of the assigned judge.[7]

In addition, it will not suffice that the tribunal judges at the second grade be a tribunal of second instance. It must be the tribunal of second grade for the tribunal that heard the case at the first grade, pursuant to the preceding canons. However, for some authors, absolute functional non-competence affects only the grade of the tribunal; for example, a tribunal of first instance can never receive an appeal. However, according to this theory, if it is a tribunal of appeal, the tribunal of first instance can judge at second instance even if it is not competent in accordance with cc. 1438–1439. In this situation the tribunal of first instance would be only relatively non-competent. Therefore, the provision of c. 1632 ("if there is no indica-

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4. Cf. A. DE LA OLIVA-M.A. FERNÁNDEZ, *Derecho Procesal Civil*, I (Madrid 1990), p. 328.

5. Cf. J.M. PINTO, "La giurisdizione," in P.A. BONNET-C. GULLO (Eds.), *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), p. 112. To the contrary, F. ROBERTI, *De processibus*, I (Rome 1956), p. 173.

6. ROTA ROMANA, *Normae Rotae Romanae Tribunalis*, in *AAS* 86 (1994), pp. 508-540; cf. SECRETARÍA DE ESTADO, *Rescriptum ex Audientia Sanctissimi*, February 23, 1995, in *AAS* 87 (1995), p. 366; V. FAGIOLO, *La figura e i poteri del Decano della Rota Romana*, in *Le "Normae" del Tribunale della Rota Romana* (Vatican City 1997), pp. 93–102; T. MAURO, *L'avocatio causae*, ibid., pp. 213-222.

7. SECRETARY OF STATE, *Rescritto di concessione al Decano della Rota Romana della facoltà di avocare una causa in prima istanza, non soltanto a norma dell'art. 52 delle Norme Proprie, ma anche –a sua discrezione- su semplice richiesta del Turno*, May 21, 1997, Prot. no. 414.266.

tion of the tribunal to which the appeal is directed, it is presumed to be made to the tribunal mentioned in cc. 1438 and 1439") would only be indicative. This opinion is based on the fact that, while the Rota can concur with the tribunals competent pursuant to cc. 1438–1439,[8] one must not forget the possibility of appeal to the Rota, possibility is included in c. 1438.

However, it seems that the literal meaning of c. 1440 is that if it does not belong to a tribunal of second instance to hear a case by virtue of the criteria of the preceding canons, then the non-competence of the tribunal of second instance is absolute and the nullity of its judgment is irremediable. It is insufficient that it is a tribunal of second grade; it must be so with respect to the tribunal of the first grade. If the tribunal of appeal is not indicated, it is understood that appeal should be made to the appropriate tribunal as determined by cc. 1438–1439. If a different tribunal is indicated, that tribunal will be absolutely non-competent. Thus, while the non-competence of the judges of first grade by reason of the territory is relative, there is no territorial criterion in force among the judges of second grade. Competence of judges of second grade is determined exclusively in view of cc. 1438–1439.[9]

The principle suffers no violation through the fact that a tribunal of second instance sometimes judges in the first grade. Such is the case of the appeal heard by a metropolitan tribunal which, for the cases brought in the metropolitan diocese, is competent at first instance. On the other hand, a tribunal of second instance can judge in the first grade when there is a question of the rights or temporal goods of a juridical person represented by the bishop, and when a new ground of nullity is introduced in the grade of appeal. A similar circumstance arises in the peculiar organization of the Italian interdiocesan tribunals erected in 1938 for the cases of marriage nullity, in which a regional tribunal is a tribunal of first grade for one region and a tribunal of appeal for others.[10]

When a tribunal of appeal judges a new ground of nullity as at first instance (c. 1683), it must send the judgment to the superior tribunal to ecclesiastical judge the new ground. The tribunal of appeal judging a new ground of nullity as at first instance should not send the judgment to the tribunal of second instance before which a judgment of first instance could be appealed, if the tribunal making use of the prescription contained in c. 1683, in addition to being a tribunal of appeal, is also the tribunal of first

8. Cf. m.p. *Qua cura*, December 8, 1938, in *AAS* 30 (1938), pp. 410–413; X. OCHOA, "I titoli di competenza," in P.A. BONNET-C. GULLO (Eds.), *Il processo matrimoniale canonico*, cit., p. 147.

9. Cf. J. LLOBELL, "Centralizzazione normativa processuale...," cit., p. 436; M.J. ARROBA, *Diritto processuale canonico* (Rome 1993), pp. 131ff.

10. Cf. X. OCHOA, "I titoli di competenza...," cit., p. 147, note 32; P. MONETA, *La giustizia nella Chiesa* (Bologna 1993), p. 44.

grade (for example, the metropolitan tribunal.)[11] In any case, c. 1683 is applicable even if the tribunal is only the tribunal of appeal. In that case, the tribunal can judge *ex lege* at first instance.

Finally, another peculiarity is the existence of a tribunal of appeal, which is non-competent to judge any case at first instance. This is the case of the interdiocesan tribunals of second instance only, or of the tribunal of appeal of the vicariate of Rome. The tribunal of appeal of the vicariate of Rome receives appeals from the regional tribunals of Lazio, Campania (Naples), and Cerdeña (Cagliari)—competent for marriage cases—as well as from the diocesan tribunals of Rome and from the other dioceses of Lazio—competent for all other cases—and from the Italian military ordinariate and the Prelature of Opus Dei. The m.p. *Sollicita cura* modified the attribution of competencies at second instance which formerly were entrusted in large measure to the Roman Rota.[12] Earlier, the m.p. *Quo civium cura* had established that the judgments of the diocesan tribunal of the State of Vatican City could only be appealed before the Roman Rota.[13] The impossibility that any peripheral tribunal can judge at second instance the judgments of the tribunals of the diocese of the Pope underscores the scope of the functional non-competence, which consists not solely of the impossibility that a tribunal of one grade may judge at a grade other than at the grade which corresponds to it, but also that it may do so apart from the hierarchical line determined in cc. 1438–1439.

The distinction between absolute and relative competence is fundamentally important for the two juridical institutions that can modify them. The extension grants competence to the relatively non-competent tribunal, while the commission gives competence to the absolutely non-competent tribunal, as is the case with functional competence.[14] Only the Apostolic Signatura can grant the extension and the commission to the non-competent tribunal,[15] with the exception of the possible commission granted by the CDWDS in favor of local tribunals in cases of nullity of sacred ordination (cf. c. 1710). The Signatura can confer competence on the inferior tribunals (c. 1445 § 3,2° speaks of *extending* competence, in an improperly broad sense, which could also encompass the commission[16]), including the Roman Rota.

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11. Cf. J. LLOBELL, "Centralizzazione normativa processuale...," cit., pp. 476ff.
12. Cf. JOHN PAUL II, m.p. *Sollicita cura*, December 26, 1987, in *AAS* 80 (1988), pp. 121–124; see also Ap. Const. *Ecclesia in Urbe*, January 1, 1998, in AAS 90 (1998), p. 193, art. 40; J. LLOBELL, "Il tribunale di appello del vicariato di Roma," in *Ius Ecclesiae* 1 (1989), pp. 266ff.
13. Cf. JOHN PAUL II, m.p. *Quo civium cura*, November 21, 1987, in *AAS* 79 (1987), pp. 1353–1355.
14. On delegation, extension and commission, see introduction on the title "The Competent Forum" and cf. J. LLOBELL, "Centralizzazione normativa processuale...," cit., pp. 465ff.
15. Cf. Z. GROCHOLEWSKI, "De ordinatione ac munere tribunalium in Ecclesia ratione quoque habita iustitiae administrativae," in *Ephemerides Iuris Canonici* 48 (1992), p. 54.
16. Cf. also *PB*, 124,3°; art. 18 *SNAS*.

Indeed, the Apostolic Signatura has been granting numerous commissions of competence,[17] both by extending the competence of peripheral tribunals and by conferring competence on the Rota so it may judge at first instance in cases which are not reserved. (Because it always judges in cases of absolute competence, this is a case of commission, not of extension of competence). The Supreme Tribunal can also confer competence by means of commission in individual cases, and can confer stable extensions of competence. If it receives the consent *ad casum* of the Roman Pontiff, the Supreme Tribunal can grant general commissions or specific commissions for the fourth or higher instance.[18]

For the extension or commission to be granted, the agreement of the parties is necessary.[19] (This is distinct from the agreement necessary to erect the interdiocesan tribunals pursuant to c. 1423[20]). The appeal of the cases judged by the tribunal which received the competence will be sent to the tribunal of appeal corresponding to that tribunal, not to the tribunal of appeal corresponding to the tribunal which lost the competence by virtue of the extension or commission.

17. A representative list (12 decrees of commissions and extensions of competence) can be found in *Ius Ecclesiae* 2 (1990), pp. 721–737.

18. Cf. Rescr., March 26, 1974, in X. OCHOA, *LE*, V (Rome 1980), no. 4279; also, J. LLOBELL, "Centralizzazione normativa processuale...," cit., p. 468, emphasizing the imprecision of the text; idem "Commissione e proroga della competenza dei tribunali ecclesiastici nelle cause di nullità matrimoniale. Sulla natura dell'incompetenza in questi processi," in *Ius Ecclesiae* 2 (1990), pp. 726ff.

19. See introduction to the title "The Competent Forum."

20. Cf. Z. GROCHOLEWSKI, "De ordinatione ac munere tribunalium...," cit., pp. 54ff.

1441 **Tribunal secundae instantiae eodem modo quo tribunal primae instantiae constitui debet. Si tamen in primo iudicii gradu, secundum can. 1425 § 4, iudex unicus sententiam tulit, tribunal secundae instantiae collegialiter procedat.**

The tribunal of second instance is to be constituted in the same way as the tribunal of first instance. However, if a sole judge has given a judgement in first instance in accordance with Can. 1425 § 4, the second instance tribunal is to act collegially.

SOURCES: cc. 1595, 1596; PIUS PP. XII, m. p. *Apostolico Hispaniarum Nuntio*, 7 apr. 1947, art. 1 (*AAS* 39 [1947] 155–163)

CROSS REFERENCES: cc. 472, 1425, 1622, 1640, 1682

COMMENTARY

Miguel Ángel Ortiz

The various instances of a case should not only follow substantially identical proceedings "with appropriate adjustments," in accordance with c. 1640, but the similarity must also be present in the constitution of the judging organ. Each instance is autonomous, formal, and substantial, to guarantee the principle of the right to a double grade of jurisdiction through appeal and—*servatis servandis*—the other challenges to the decision. On one hand, the offices of the respective curia of justice should be constituted in parallel to the first grade. In the case of appeal tribunals that are also diocesan tribunals for other cases, it is unnecessary to have some persons interested exclusively in cases of first instance and others interested only in appeals. The same people can address both, as long as the two grades do not coincide in the same case.[1]

In addition, the tribunal that judges in second instance should have the same number of judges as the first instance tribunal, as noted in cc. 1595–1596 *CIC*/1917. However, those canons did not admit exception to the provision of c. 1576 § 1 *CIC*/1917, which required the constitution of a tribunal college for specific cases under penalty of incurable nullity (cf. c. 1892,1° *CIC*/1917). *CM* admitted that, if it was impossible to form a

1. Cf. R. BURKE, "The distinction of personnel in hierarchically-related Tribunals," in *Studia Canonica* 28 (1994), pp. 85–98; for another opinion, M.J. ARROBA, commentary on c. 1441, in A. BENLLOCH POVEDA (Dir.), *Código de Derecho Canónico* (Valencia 1993), p. 637.

college of three clerical judges, the episcopal conference could permit that "in first and second grade a college of two clerics and one lay man be constituted" (a. V § 1). Paragraph 2 of the same norm added that "in first grade, when even with the addition of a lay man, a college cannot be constituted in accordance with § 1, the bishops' conference can entrust cases of nullity of marriage, in each of the cases, to a single clerical judge" who will serve, whenever possible, as assessor and auditor in the proceedings.

Canon 1425 § 1 maintains the general rule that requires a collegial organ to judge cases regarding the state of persons (no. 1) and some penal cases (no. 2). If the requirements of the collegial constitution are not respected, the decision will be void, although remediable (cf. c. 1622,1°).

Paragraph four of c. 1425, extends to all cases the provision that *CM* reserved for matrimonial cases. It establishes that, "in the first grade of the proceeding," if it is impossible to form a college, the episcopal conference can permit the bishop to entrust to a single clerical judge the cases for which the previous paragraphs require the constitution of the tribunal, as long as the impossibility persists.[2] To avoid the appeal from also being assigned to a single person, c. 1441 adds to its precedent canon (c. 1596 *CIC*/1917) the comment "if in first instance the decision was issued by a single judge, according to c. 1425 § 4, the tribunal of second instance will act collegially." In this way, c. 1441 assures that the cases of c. 1425 § 1 will be judged collegially in second instance, which is necessary to obtain the conforming second judgment (c. 1684).

However, c. 1425 § 2 adds that the bishop may freely confer to a tribunal college the most difficult cases or those of major importance. In such cases, it will be necessary to constitute a college to judge the appeal, because when c. 1441 requires that the tribunal be collegial in second instance, it does not exclusively relate it to the cases of § 1 of c. 1425, but rather to the composition of the organ of first instance that heard the case.[3] Otherwise, the legislator would have said that the cases of c. 1425 § 1 should always be heard collegially in second instance.

The tribunal college of second instance will proceed according to the criteria established in c. 1426. Could a lay judge also be a part of this college? Although c. 1421 § 2 forms part of chapter 1 of title II ("The Tribunal of First Instance"), a lay judge can be present in tribunals of second instance for two reasons; first, because c. 1421 § 2 does not specify the limitation to clerics, and second, because a. V § 1 of *CM* expressly admitted that tribunals could be formed "in first and second grade" with two clerics and a lay person. (While the language of a. V § 1 of *CM* specified "a lay *man*," that restriction is currently abolished).[4]

2. See commentary on 1425; *Comm.* 10 (1978), pp. 233ff; 16 (1984), p. 57.
3. To the contrary, M.J. ARROBA, commentary on c. 1441, cit., p. 637.
4. Cf. in that sense J.J. GARCÍA FAÍLDE, *Nuevo derecho procesal canónico* (Salamanca 1992), p. 68; L. CHIAPPETTA, *Il Codice di Diritto Canonico* (Naples 1988), no. 4638.

It was suggested that a single person tribunal of appeal be admitted when there had been a college in the first instance, since it was understood that the ratifying decree discussed in *CM* (cf. c. 1682 § 2) is something less than the ordinary proceeding of a single judge. This proposal was rejected since *quo altior est gradus iudicii, maior est numerus iudicum.*[5] The reasoning that supported the rejection of this proposal did not satisfy one consultor. He proposed, upon revising the 1976 *Schema*, eliminating the entire clause *si tamen in primo iudicii gradu ... iudex unicus sententiam tulit, tribunal secundae instantiae collegialiter procedat.* The rejection of his proposal emphasized the intention of the *coetus* to avoid "abuses in the concession of c. 1377 § 4 [currently c. 1425 § 4] and the thoughtlessness with which, in some places, single judges declare null marriages, makes it necessary to require a tribunal college at the level of appeal, in such a way that at least a greater possibility exists to correct errors of the single judge through the tribunal college."[6]

Thus, in the ordinary matrimonial process, a tribunal college always hears a case in second instance. If nullity of the marriage was declared in first grade, those who judge in second instance will follow the path outlined in c. 1682 § 2. They will confirm without delay through decree or will admit the case to examination through the ordinary process in second instance. The risk of banalizing the decree of ratification should be kept in mind, since this will be the result of a single person in the second grade devaluing the votes and the examination of the three judges in this phase of automatic appeal. In such a situation, the judicial nature of the decree of ratification and its collegial paternity would be obscured.[7]

In addition to the exception noted in c. 1425 § 4, there is a single judge or judicial vicar in the documentary proceeding of nullity of marriage (cf. c. 1686 and commentary). Nevertheless, in such a case, a single judge also receives the possible appeal and ratification of an affirmative decision in first instance, and returns the case to the tribunal of first instance to follow the ordinary process (cf. c. 1688). On the other hand, when in the ordinary process a new ground of nullity is introduced in accordance with c. 1683, and the appeal tribunal judges "as in the first instance," such judgment must be done collegially.

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5. *Comm.* 10 (1978), p. 244.
6. *Comm.* 16 (1984), p. 58.
7. See commentary on 1682; F. GIL DE LAS HERAS, "Organización judicial de la Iglesia en el nuevo Código," in *Ius Canonicum* 24 (1984), p. 140; J. LLOBELL, "La genesi della sentenza canonica," in P.A. BONNET-C. GULLO (Eds.), *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), pp. 719ff.

CAPUT III
De Apostolicae Sedis tribunalibus

CHAPTER III
The Tribunals of the Apostolic See

1442 **Romanus Pontifex pro toto orbe catholico iudex est supremus, qui vel per se ipse ius dicit, vel per ordinaria Sedis Apostolicae tribunalia, vel per iudices a se delegatos.**

The Roman Pontiff is the supreme judge for the whole catholic world. He gives judgement either personally, or through the ordinary tribunals of the Apostolic See, or through judges whom he delegates.

SOURCES: c. 1597

CROSS REFERENCES: cc. 331, 333, 334, 360, 361, 1372, 1402, 1404–1406, 1417, 1443–1445, 1629,1°

COMMENTARY
Zenon Grocholewski

This canon addresses two issues: the judicial power of the Roman Pontiff and the manners of exercising this power.[1]

1. The statement that the Pope is the supreme judge for the whole Church expresses a truth of the faith (see introduction to title II, no. 8). It is reflected in the judicial arena when it is generically affirmed in cc. 331 and 333 § 1.

Some other dispositions of the *CIC* are directly set forth in the statement that the Pope is the supreme judge for the whole Church. These are:

1. Regarding the whole problem, cf. Z. GROCHOLEWSKI, "Il Romano Pontefice come giudice supremo nella Chiesa," in *Ius Ecclesiae* 7 (1995), pp. 39–64.

a) the impossibility to judge acts of the Roman Pontiff (c. 1404 in relation with 1406 § 1, c. 1732); *b)* the consequent impossibility of appeal or recourse against sentences or decrees of the Roman Pontiff (cc. 333 § 3, 1629,1°); *c)* the absolute non-competence of all other judges to judge acts confirmed by the Roman Pontiff in a specific manner, unless the Pontiff himself grants the corresponding mandate (c. 1405 § 2 together with c. 1406 § 2); *d)* the power of the Roman Pontiff to refer to himself any case of competence of the Church (c. 1417).

By virtue of his power as supreme judge for the whole Church, the Roman Pontiff has reserved some cases to himself (c. 1405 § 1), and has reserved others to the ordinary tribunal of the Roman Rota (c. 1405 § 3), such that in these cases the non-competence of other judges is absolute (c. 1406 § 2).

2. There are three ways the Roman Pontiff may judge cases:

a) *Personally.* In such cases, the Roman Pontiff is not bound by any positive human law and his decisions cannot be challenged. At most in such cases, a petition to the benefit of a new examination may be submitted.

b) *Through the ordinary tribunals of the Apostolic See;* that is, through the Roman Rota (*PB* 126–130: see commentary on cc. 1443–1444) and the Supreme Tribunal of the Apostolic Signatura (*PB* 121–125: see commentary on c. 1445). This is the ordinary manner of exercising judicial power by the Roman Pontiff (see c. 360). In any case, the decisions of the ordinary tribunals of the Apostolic See cannot be qualified as decisions of the Roman Pontiff, and therefore may be contested in accordance with the law.

c) *Through judges whom the Pontiff delegates.* The Roman Pontiff, when reserving a judicial case to himself, normally commits the case to the Roman Rota (*PB* 129 § 1,4°: see commentary on cc. 1443–1444). On the other hand, when reserving an administrative controversy to himself, the Pontiff ordinarily refers the case to the Apostolic Signatura (*PB* 123 § 3: see commentary on c. 1445). On other subjects, the Pontiff he may delegate any case for judgment. In this last situation, the Roman Pontiff determines the norms must be observed and whether or not the corresponding decision may be contested.

1443 **Tribunal ordinarium a Romano Pontifice constitutum appellationibus recipiendis est Rota Romana.**

The ordinary tribunal constituted by the Roman Pontiff to receive appeals is the Roman Rota.

SOURCES: c. 1598 § 1; *NSRR* 1; *REU* 109; SRR *Nuove Norme*, 25 maii 1969, art. 1 § 1

1444 **§ 1. Rota Romana iudict:**
1° in secnnda instantia, causas quae ab ordinariis tribunalibus primae instantiae diiudicatae fuerint et ad Sanctam Sedem per appellationem legitimam deferantur;
2° in tertia vel ulteriore instantia, causas ab ipsa Rota Romana et ab aliis quibusvis tribunalibus iam cognitas, nisi res iudicata habeatur.

§ 2. Hoc tribunal iudicat etiam in prima instantia causas de quibus in can. 1405 § 3, aliasve quas Romanus Pontifex sive motu proprio, sive ad instantiam partium ad suum tribunal advocaverit et Rotae Romanae commiserit; easque, nisi aliud cautum sit in commissi muneris rescripto, ipsa Rota iudicat etiam in secunda et ulteriore instantia.

§ 1. The Roman Rota judges:
1° in second instance, cases which have been judged by ordinary tribunals of first instance and have been referred to the Holy See by a lawful appeal;
2° in third or further instance, cases which have been processed by the Roman Rota itself or by any other tribunal, unless there is a question of an adjudged matter.

§ 2. This tribunal also judges in first instance the cases mentioned in Can. 1405 § 3, and any others which the Roman Pontiff, either on his own initiative or at the request of the parties, has reserved to his tribunal and has entrusted to the Roman Rota. The Rota judges these cases also in second or further instances, unless the rescript entrusting the task provides otherwise.

SOURCES: § 1: c. 1599 § 1; *PrM* 216 § 1; *REU* 109; *NSRR* 27 § 2; PAULUS PP. VI, Ap. Const. *Vicariae potestatis,* 6 ian. 1977, art. 20 et 22 (*AAS* 69 [1977] 17)
§ 2: c. 1599 § 2

CROSS REFERENCES: cc. 19, 1402, 1405 § 1,4° et § 3, 1406 § 2, 1417, 1442, 1445 § 1, 1632 § 2

COMMENTARY

Zenon Grocholewski

These canons have been abrogated by arts. 126–130 of the Ap. Const. *Pastor Bonus.*

126. The Roman Rota is a court of higher instance at the Apostolic See, usually at the appellate stage, with the purpose of safeguarding rights within the Church; it fosters unity of jurisprudence, and, by virtue of its own decisions, provides assistance to lower tribunals.

127. The judges of this Tribunal constitute a college. Persons of proven doctrine and experience, they have been selected by the Supreme Pontiff from various parts of the world. The Tribunal is presided over by a dean, likewise appointed by the Supreme Pontiff from among the judges and for specific term of office.

128. This Tribunal adjudicates:

1°. in second instance, cases that have been decided by ordinary tribunals of the first instance and are being referred to the Holy See by legitimate appeal;

2°. in third or further instance, cases already decided by the same Apostolic Tribunal and by any other tribunals whatever, unless they have become a res iudicata.

129. § 1. The Tribunal, however, judges the following in first instance:

1°. bishops in contentious matters, unless it deals with the rights or temporal goods of a juridical person represented by the bishop;

2°. abbots primate or abbots superior of a monastic congregation and supreme moderators of religious institutes of pontifical right;

3°. dioceses or other ecclesiastical persons, whether physical or juridical, which have no superior below the Roman Pontiff;

4°. cases which the Supreme Pontiff commits to this Tribunal.

§ 2. It deals with the same cases even in second and further instances, unless other provisions are made.

130. The Tribunal of the Roman Rota is governed by its own law.

1. *Nature and triple function of the Roman Rota (PB* 126)

As in c. 1443, in *Pastor Bonus* the Roman Rota is considered essentially the tribunal of appeal, although keeping in mind art. 129, *pro more* has been added with a realist attitude. For the first time in a legislative text, a triple function of the Roman Rota is indicated: *a)* to protect the rights of the faithful; *b)* to foster the unity of jurisprudence; *c)* to assist inferior tribunals through its decisions.[1]

The function relating to the unity of jurisprudence deserves special importance . Among the many affirmations of the Roman Pontiffs on this subject,[2] it is prudent to keep in mind the words of John Paul II: "The attention and immediate availability of the regional and diocesan tribunals to follow the direction of the Holy See, the constant rotal jurisprudence ... without recourse to presumptions or probable innovations, to interpretations that do not find objective support in the canonical norm and that are not guaranteed by any qualified jurisprudence contribute, in no small part, to the necessary protection of the family. In effect, *any innovation of the law that is both substantial and procedural, that does not find support in jurisprudence or in the practice of the tribunals and dicasteries of the Holy See, is rash.* We should be persuaded that clear, attentive, considered and exhaustive examination of matrimonial cases requires clear conformity with the true doctrine of the Church, with the Canon law and with pure canonical jurisprudence, which has grown over all through the contribution of the Sacred Roman Rota."[3]

The Apostolic Signatura, which has vigilance over the true administration of justice in the Church (*PB* 124,1°: see commentary on c. 1445), often exhorts tribunals to study and follow the jurisprudence of the Roman Rota; that is, to grant a dispensation of the academic titles required for the operators of justice (see commentary on c. 1420: no. 10), to entrust the judgment in a case of third instance to a local tribunal (*PB* 124,2°: see commentary on c. 1445: no. 6), or to transfer to a tribunal the observations regarding its actions (*PB* 124,1°: see commentary on c. 1445: no. 6).

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1. Cf. Z. GROCHOLEWSKI, "Problemi attuali dell'attività giudiziaria della Chiesa nelle cause matrimoniali," in *Apollinaris* 56 (1983), pp. 159–163; German translation: "Probleme kirchlicher Ehegerichtsbarkeit heute," in *Österreichisches Archiv für Kirchenrecht* 33 (1982), pp. 409–411; idem "I tribunali apostolici," in *Le nouveau Code de Droit Canonique-The New Code of Canon Law. (V Congrès International de Droit Canonique-5th International Congress of Canon Law)* (Ottawa 1986), vol. I, pp. 464–469; idem *I tribunali*, in *La Curia Romana nella Cost. Ap. "Pastor Bonus,"* (Vatican City 1990), p. 414.

2. Cf., e.g., Z. GROCHOLEWSKI, "Processi di nullità matrimoniale nella realtà odierna," in *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), p. 20.

3. *Address to the Roman Rota*, January 24, 1981, no. 5, in *AAS* 73 (1981), p. 232. Cf. also M.F. POMPEDDA, "La giurisprudenza come fonte di diritto nell'ordinamento canonico matrimoniale," in *Quaderni Studio Rotale* 1 (1987), pp. 47–72.

2. *Judges of the Rota (PB* 127)

The *CIC*/1917 (c. 1598 § 2), the *REU* (art. 109, which refers to the *CIC*/1917) and the *NSRR* of 1982 (art. 3 § 1) required that Rotal judges have academic titles, live honestly, and show prudence and expertise in the law. The Const. *Pastor Bonus*, evidently taking these qualities for granted, stresses that Rotal judges have proven doctrine and experience. *Pastor Bonus* also requires that Rotal judges come from "different parts of the world." This disposition, reflects the desire expressed by the council Fathers (*CD* 10) and is confirmed in other parts of *Pastor Bonus* (cf. Introd. and art. 9), is meant to accumulate various experiences in the Rota.

The office of Dean in the previous legislation corresponded *ipso iure* to the most senior judge.[4] However, *Pastor Bonus* establishes that the Dean is named by the Holy Father from among the Rotal judges. The Dean's appointment is for a determined amount of time. It is easily understood that these novelties are of great functional relevance.[5]

3. *Competence of the Roman Rota in the second and further instance (PB* 128)

In second instance, the Roman Rota is a concurrent tribunal with all inferior tribunals of the second grade (see c. 1438). This should be kept in mind with respect to c. 1632 § 2.[6]

In third and further instance, the Roman Rota by universal law is the only tribunal competent for the Latin Church. It judges in different grades through different judges in turn. Nonetheless, some local tribunals of third and further instance have been instituted by a specific law or by pontifical indult. In addition, for singular cases, the Apostolic Signatura can entrust decisions of third instance to local tribunals and can provide that cases be entrusted in further instances to local tribunals (*PB* 124,2° see commentary on c. 1445: no. 6).

For the faithful of the Church in Spain, the possibility to appeal to the Roman Rota in the second instance is not yet conditioned on a prior agreement between the parties.[7]

4. *NSRR* (1934), art. 3, §2; *NSRR* (1982), art. 4.

5. Cf. Z. GROCHOLEWSKI, *I tribunali apostolici*, cit., p. 468; idem *I tribunali*, cit. pp. 415–416.

6. Regarding this question cf. Z. GROCHOLEWSKI, "L'appello nelle cause di nullità matrimoniale," in *Forum* 4 (1993) II, pp. 37–39.

7. M.P. *Nuntiaturae Apostolicae in Hispania*, October 2, 1999, in *AAS* 92 (2000), pp. 5-17. Cf. regarding the abolished discipline, M.P. *Apostolico Hispaniarum Nuntio*, arts. 39 and 41, in *AAS* 39 (1947), p. 161; cf. also S. CONG. DE ASUNTOS ECLESIÁSTICOS EXTRAORDINARIOS, *Letter*, January 22, 1954, prot. no. 416/54; c. Bonet, April 12, 1957, in SRRD 49 (1957), pp. 334–335.

The clause "unless they have become a res iudicata" of art. 128,2° appears superfluous, keeping in mind c. 1629,3°.

4. *Competence of the Roman Rota in the first instance* (*PB* 129)

This addresses certain physical or juridical persons (cf. cc. 96–123) of particular ecclesiastical relevance, which can be considered "privileged."

With respect to nos. 1°–3°, see commentary on c. 1405 § 3 and to c. 1419: no. 7.

Concerning no. 4°, the Holy Father generally entrusts to the Roman Rota the judgment of cases that have been reserved to him according to c. 1405 § 1,4° (cf. the text of c. 1444 § 2).

Paragraph 2, in providing that the Roman Rota "deals with the same cases even in second and further instances" agrees with what is established at the beginning of art. 128,2°. The clause *nisi aliter cautum sit* can be referred, for example, to the case of further instance that the Roman Pontiff would wish to define personally, or to entrust to judges constituted *ad casum*, or to entrust to the Rota with the clause *appellatione remota.*

5. *The Roman Rota's own law* (*PB* 130)

The current law proper to the Roman Rota is the *Normae Sacrae Romanae Rotae Tribunalis* of April 18, 1994,[8] which has been in effect since October 1, 1994. Concerning the static part, this law replaced the 1982 *NSRR.* Concerning the procedural part this law replaced arts. 59–185 of the 1934 *NSRR* (cf. 1982 *NSRR*, art. 65). Nonetheless, the last article of the new *Normae* establishes, "*Si quaestio oriatur de interpretatione harum Normarum, recursus fiat ad Normas anno 1934 promulgatas, iis exceptis, quae vigenti Iuris Canonici Codici refragantur*". The new *NSRR* was approved by the Holy Father *in forma specifica.*[9]

In the appendix to the 1982 *NSRR* is the decree regarding the Studio Rotale, which remains in effect. Moreover, the extraordinary faculties of the Dean of the Rota enumerated in appendix 1 of the 1982 *NSRR*[10] appear to be still in effect. They have not been absorbed by the new *Normae* or surpassed by the dispositions of the *CIC* (regarding the first faculty, cf. c. 1683 and art. 55 § 2 of the new *NSRR*; regarding the fourth, cf. art. 52 of the new *NSRR*; the third has been partially surpassed by cc. 1433, 1435,

8. *AAS* 86 (1994), pp. 508–540.
9. Rescr. of the Cardinal Secretary of State, February 23, 1995.
10. *AAS* 74 (1982), p. 516.

483 § 2, 1622,3° and 5°, together with cc. 1623, and 1626 § 2). However, the question of the Dean's extraordinary faculties is not completely clear. Keeping in mind the inclusion of the first and the fourth faculties with some changes in the same *NSRR* (thus there is no clear motive for these faculties to be included while others are not included, in the case where maintaining the other faculties is desirable), and the lack of adaptation on the occasion of the issuance of the new *NSRR* of the second and third faculties to the current legislation, we cannot exclude that the new *NSRR* would have attempted to integrally reorder all the material and that, consequently, and keeping in mind by analogy c. 20, these faculties have been repealed.

6. *Advocates and procurators*

In addition to the Consistorial Advocates and the Procurators of the Sacred Apostolic Palaces, which have been replaced with *Pastor Bonus* by the "Body of advocates of the Holy See" (see commentary on c. 1445: no. 8), only persons who have three years of study in the Studio Rotale and a diploma of Rotal Advocate can be registered in the list of the Roman Rota.

1445 **§ 1. Supremum Signaturae Apostolicae Tribunal cognoscit:**

1° querelas nullitatis et petititones restitutionis in integrum et alios recursus contra sententias rotales;

2° recursus in causis de statu personarum, quas ad novum examen Rota Romana admittere renuit;

3° exceptiones suspicionis aliasque causas contra Auditores Rotae Romanae propter acta in exercitio ipsorum muneris;

4° conflictus competentiae de quibus in can. 1416.

§ 2. Ipsum Tribunal videt de contentionibus ortis ex actu potestatis administrativae ecclesiasticae ad eam legitime delatis, de aliis controversiis administrativis quae a Romano Pontifice vel a Romanae Curiae dicasteriis ipsi deferantur, et de conflictu competentiae inter eadem dicasteria.

§ 3. Supremi huius Tribunalis praeterea est:

1° rectae administrationi iustitiae invigilare et in advocatos vel procuratores, si opus sit, animadvertere;

2° tribunalium competentiam prorogare;

3° promovere et approbare erectionem tribunalium, de quibus in cann. 1423 et 1439.

§ 1. The Supreme Tribunal of the Apostolic Signatura hears:

1° plaints of nullity, petitions for total reinstatement, and other recourses against rotal judgements;

2° recourses in cases affecting the status of persons, which the Roman Rota has refused to admit to a new examination;

3° exceptions of suspicion and other cases against Auditors of the Roman Rota by reason of things done in the exercise of their office;

4° the conflicts of competence mentioned in Can. 1416.

§ 2. This same tribunal deals with controversies which arise from an act of ecclesiastical administrative power, and which are lawfully referred to it. It also deals with other administrative controversies referred to it by the Roman Pontiff or by departments of the Roman Curia, and with conflicts of competence among these departments.

§ 3. This Supreme Tribunal is also competent:

1° to oversee the proper administration of justice and, should the need arise, measures against advocates and procurators;

2° to extend the competence of tribunals;

3° to promote and approve the establishment of the tribunals mentioned in cann. 1423 and 1439.

SOURCES: § 1: c. 1603 § 1; Signatura Decisio, 25 nov. 1922; *SNAS* 17 § 2; 19 § 1; 20 § 1; 21 § 1
§ 2: *REU* 106, 107; *SNAS* 96; Signatura Decisio, 10 maii 1968; Signatura Decisio, 21 maii 1968; Signatura Decisio, 24 mar. 1969; Signatura Decl., 9 nov. 1970; Signatura Decisio, 15 dec. 1970
§ 3: *REU* 105; *SNAS* 17 § 1, 18; Signatura Decl., 22 oct. 1970; Signatura Rescr., 2 ian. 1971; Signatura Rescr., 26 mar. 1974; Signatura Rescr., 20 feb. 1976

CROSS REFERENCES: cc. 19, 1402, 1416, 1442, 1629,1°

COMMENTARY

Zenon Grocholewski

Articles 121–125 of the Ap. Const. *Pastor Bonus* have replaced this canon:

121. The Apostolic Signatura functions as the supreme tribunal and also ensures that justice in the Church is correctly administered.

122. This Tribunal adjudicates:

1°. complaints of nullity and petitions for total reinstatement against sentences of the Roman Rota;

2°. in cases concerning the status of persons, recourses when the Roman Rota has denied a new examination of the case;

3°. exceptions of suspicion and other proceedings against judges of the Roman Rota arising from the exercise of their functions;

4°. conflicts of competence between tribunals which are not subject to the same appellate tribunal.

123. § 1. The Signatura adjudicates recourses lodged within the peremptory limit of thirty useful days against singular administrative acts whether issued by the dicasteries of the Roman Curia or approved by them, whenever it is contended that the impugned act violated some law either in the decision-making process or in the procedure used.

§ 2. In these cases, in addition to the judgement regarding illegality of the act, it can also adjudicate, at the request of the plaintiff, the reparation of damages incurred through the unlawful act.

§ 3. The Signatura also adjudicates other administrative controversies referred to it by the Roman Pontiff or by dicasteries of the Roman Curia, as well as conflicts of competence between these dicasteries.

124. The Signatura also has the responsibility:

1°. to exercise vigilance over the correct administration of justice, and, if need be, to censure advocates and procurators;

2°. to deal with petitions presented to the Apostolic See for obtaining the commission of a case to the Roman Rota or some other favour relative to the administration of justice;

3°. to prorogate the competence of lower tribunals;

4°. to grant its approval to tribunals for appeals reserved to the Holy See, and to promote and approve the erection of interdiocesan tribunals.

125. The Apostolic Signatura is governed by its own law.

The Supreme Tribunal of the Apostolic Signatura is one of the most reformed dicasteries of the Roman Curia in the post-conciliar period. It appears to be in an evolutionary phase still.[1]

1. *Nature of the Apostolic Signatura* (*PB* 121)

Article 121 reaffirms that the Apostolic Signatura is found at the apex of both ordinary and administrative justice. On the other hand, it is not just a court but also carries out other functions.

The Signatura is divided into three sections, to which correspond the three successive articles of *Pastor Bonus* 122–124. In the first section, the Signatura is the supreme court of ordinary justice for contentious and penal cases, similar to the court of cassation in some European countries. In the second section, it is under the auspices of the organs of administrative justice for contentious-administrative cases. In the third section, the Signatura is not a tribunal but an administrative organ with competence over the administration of justice in the Church. Therefore, using canonical language, it could be characterized as a "congregation of justice."

1. Regarding the dynamic of this development, cf. Z. GROCHOLEWSKI, "La Segnatura Apostolica nell'attuale fase di evoluzione," in *Dilexit iustitiam (in honorem A. Card. Sabattani)* (Vatican City 1984), pp. 211–228; idem, "I tribunali apostolici," in *Le nouveau Code de Droit Canonique-The New Code of Canon Law. (V Congrès International de Droit Canonique-5th International Congress of Canon Law)* (Ottawa 1986), vol. I, pp. 469–478; idem, *I tribunali*, in *La Curia Romana nella Cost. Ap. "Pastor Bonus,"* (Vatican City 1990), pp. 401–418; idem, "Die Verwaltungsgerichtsbarkeit der Apostolischen Signatur," in *Österreichisches Archiv für Kirchenrecht* 40 (1991), pp. 3–13; Italian translation, "La giustizia amministrativa presso la Segnatura Apostolica," in *Ius Ecclesiae* 4 (1992), pp. 3–14.

2. *Judges of the Apostolic Signatura*

According to the *CIC*/1917 (c. 1662) and the *REU* (art. 104), the Signatura was made up of various Cardinals appointed by the Roman Pontiff (the *Normae speciales* of the Signatura (see below, no. 7) issued on execution of the *REU*, establishing in art. 1 the number of 12 Cardinal judges). Therefore, all judges in the Signatura were Cardinals. This norm has been abolished, since *Pastor Bonus*, which integrally reordered all matters of the *REU*, no longer contains it (cf. c. 20). Therefore, the disposition of *Pastor Bonus* 3, the general norm under which "the dicasteries ... are made up of a Cardinal Prefect or an Archbishop President, a specific number of Cardinal Fathers and some Bishops...,"[2] applies to the Signatura. In fact, the Holy Father, on May 20, 1991, appointed some bishops as judges of the Signatura.[3]

On July 1, 1976, the PCIDSVC responded that the exception of suspicion against the Cardinal judges of the Signatura could be proposed. In this case, the question should be submitted to the Roman Pontiff.[4]

3. *Sentences of the Apostolic Signatura*

The norm of the *CIC*/1917 (c. 1605 § 1), under which the sentences of the Signatura were valid even though the reasons for the decision were not expressed, has been abolished.[5]

With respect to opposition, the sentences of the Signatura cannot be appealed (c. 1629,1°). Nonetheless, the plaint of nullity or the petition of *restitutio in integrum* against them cannot be excluded.[6]

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2. Cf. Z. GROCHOLEWSKI, *I tribunali*, cit., pp. 402–403.
3. *AAS* 83 (1991), p. 631.
4. *AAS* 68 (1976), p. 635. Cf. L. DEL AMO PACHÍN, "La excepción de sospecha contra los Cardenales de la Signatura Apostólica," in *Revista Española de Derecho Canónico* 32 (1976), pp. 349–357; P. TOCANEL, "Adnotationes," in *Apollinaris* 49 (1976), pp. 350–360; X. OCHOA, "De recusatione iudiciali Patrum Cardinalium Signaturae Apostolicae," in *Apollinaris* 50 (1977), pp. 194–245; published also in *Opus iustitiae pax (Miscellanea in onore di X. Ochoa)* (Vatican City 1990), pp. 19–58.
5. Cf. Z. GROCHOLEWSKI, "La Segnatura...," cit., pp. 218–219.
6. Cf. Signatura, *sentencias*, February 27, 1993, prot. no. 18.190/86 *CAd*; March 27, 1993, prot. no. 22.221/90 *CAd* and *decl.*, September 24, 1993, prot. no. 19.070/87 *CAd*; cf. also P. MONTINI, "De querela nullitatis deque restitutione in integrum adversus sententias Sectionis alterius Supremi Signaturae Apostolicae Tribunalis," in *Periodica* 82 (1993), pp. 669–697; J. LLOBELL, "Note sull'impugnabilità delle decisioni della Segnatura Apostolica," in *Ius Ecclesiae* 5 (1993), pp. 675–698.

4. *The Apostolic Signatura as supreme tribunal of ordinary justice (PB 122)*

This function is primarily exercised with respect to the decisions and judges of the Rota. In four sections, *Pastor Bonus* 122 lists six competencies of the Signatura on this matter (nos. 1° and 3° contain two competencies each):

— Regarding the *plaint of nullity,* cf. cc. 1619–1627. Nevertheless, in contrast to what is laid out in cc. 1624–1625 and 1627, the plaint of nullity against Rotal decisions can be proposed only before the Signatura. When there is also an appeal, the plaint must be addressed before the Signatura first. Only later, if nullity is not found, will the appeal be heard before the Rota. Before the Signatura, the plaint of nullity is not substantiated in the oral process. According to art. 19 of the *Normae speciales* (see below, no. 7), the plaint of nullity can be presented before the Signatura only when the vices of nullity are manifestly apparent. Plaints against interlocutory decisions can only be made when the damage caused cannot be repaired by the definitive sentence, or when the decision has the force of a definitive sentence (cf. c. 1618).

— With respect to petitions of *restitutio in integrum,* cf. cc. 1645–1648. Nonetheless, unlike what is established in cc. 1646 and 1648, *restitutio in integrum* against a Rotal decision can be requested only before the Signatura. When *the Signatura concedes restitutio in integrum,* the Rota should know about the contents of the case.

— *Recourse against refusal of the new examination of the case* (cf. cc. 1643–1644) *by the Rota.* Practically speaking, this addresses an appeal, in which the object of the examination and of the decision of the Signatura are the same as that pronounced by the Rota; namely, the existence of new and grave arguments. Some maintain that, against the refusal of a new examination by the Roman Rota, there should be an appeal to another *turnus* of the Rota first. Only after such appeal should the case be presented for recourse before the Signatura. However, others maintain that such appeals should be taken only in cases in which the Rota has not yet judged the contents of the case. There are yet others who say that all cases of refusal of a new examination can be appealed before either another *turnus* of the Rota or before the Signatura.[7] It seems most in keeping with the fundamental principles of the appeal that, once the first decision of the Rota has rejected a new examination, the case can have recourse only before the Signatura. In effect, if the decisions of two inferior tribunals are in agreement and do not allow for a subsequent appeal, admitting recourse (recourse is in reality an appeal) against the two conforming decisions of the Rota is offensive to this apostolic tribunal. In any case, the Signatura

7. Cf. E. DEL CORPO, *De retractatione causae matrimonialis* (Neapoli 1969), pp. 149–164.

admits and judges such recourse whether it has been proposed after a single Rotal decision or after two.

— With respect to *exceptions of suspicion*, cf. c. 1449. However, against a Rotal judge, this exception can only be presented before the Signatura.

— *Cases against judges of the Rota for acts carried out in the exercise of their functions* refer to the punishable abuses considered in c. 1457 § 1. The Signatura may judge over the imposition of the penalty as well as over the eventual reparation of damages (cf. c. 128).

— *Regarding conflicts of competence*, cf. c. 1416. This is the only competence of the first section of the Signatura does not refer necessarily to decisions or to the Rotal judges. In any case, this also addresses the conflicts of competence among the Rota and inferior tribunals.[8]

5. *The Apostolic Signatura as supreme tribunal of administrative justice* (*PB* 123)

This addresses conflicts arising from a singular administrative act (cf. book I, tit. IV and c. 1400 § 2). It is the means of defending the faithful and juridical persons against an act of the administrative authority (executive: cf. c. 135) in the Church.

In the broad sense, administrative justice refers to any means of opposition foreseen in the law to defend the faithful and juridical persons against an act of the administrative authority. Therefore, it includes the petitions of revision and hierarchical recourse addressed in cc. 1732–1739, as in *Pastor Bonus* 19 § 1 and the *RGCR* 134–138 and 125.

In the strict sense, administrative justice refers only to the judicial means foreseen for the solution of those conflicts. Until today there has existed only one administrative tribunal in the Church; namely, the second section of the Signatura, was formed by *REU* (art. 106) in 1967. It is placed at the apex of organs of administrative justice understood in the broad sense.

a) *Principal competence of the second section* (§§ 1–2)

This refers to recourse presented before the Signatura against singular administrative acts:

— *carried out* by the dicasteries of the Roman Curia (according to *PB* 2 § 1: "the Secretariat of State, Congregations, Tribunals, Councils and Offices; namely, the Apostolic Camera, the Administration of the Patrimony of the Apostolic See, and the Prefecture for the Economic Affairs of

8. Cf. Z. GROCHOLEWSKI, "L'appello nelle cause di nullità matrimoniale," in *Forum* 4, II (1993), p. 38.

the Holy See"), of which there is no superior authority other than the Roman Pontiff.

— or also *approved* by these dicasteries, in which case the singular administrative acts are presumed to be issued by inferior authorities, challenged in the tenor of cc. 1732–1739 to ask for the decision of the dicastery of the competent Roman Curia "in that subject manner" (*PB* 19 § 1). With respect to the procedure for examination of the hierarchical recourse before dicasteries, cf. *RGCR* 134–138 and 125.

According to the constant jurisprudence of the Signatura, the inferior administrative authority can also make recourse to the second section when its act has been reformed by a dicastery of the Roman Curia in response to recourse presented by the interested faithful. This jurisprudence is justified primarily in the origin and nature of the power of the Church.[9]

The *Response* of the CPI of April 29, 1987[10], under which a group of faithful without both juridical personality and the recognition foreseen in c. 299 § 3, lacks active legitimacy *as a group* to make hierarchical recourse against a decree of the proper diocesan bishop, have legitimacy as singular faithful (who act together or separately), and provided the faithful have truly suffered damage, whose value the judge will recognize with sufficient discretion—this is also true for recourse sought before the second section of the Signatura. Further, the question was specifically provoked by a specific case carried to the Signatura. The corresponding sentence of the Signatura, of November 21, 1987,[11] therefore constitutes a jurisprudential commentary on this response.

The recourse should be presented to the Signatura within the set term of thirty canonical days. (That is, the right to recourse perishes if the term ends without action and the term cannot be extended: cf. c. 1465 § 1. Although the canonical days do not pass "when one is unaware, or when one is unable to act": c. 201 § 2). Persons who attempt to oppose a singular administrative act carried out or approved by a dicastery of the Roman Curia before the Signatura should present to the same dicastery, "within the term of ten canonical days from the date of notification, the petition of revocation or amendment of the act" (*RGCR* 135 § 1).

Contrary to what occurs in the case of hierarchical recourse (cf. cc. 1737 § 1 and 1739; cf. *RGCR* 136 § 1), the *object of the recourse* to the Signatura can only be:

— the *illegitimacy of the act;* that is, the violation of some law in the deliberation or proceeding. The affirmative decision of the Signatura therefore involves, at least implicitly, either the declaration of nullity of

9. Cf. Z. GROCHOLEWSKI, "L'autorità amministrativa come ricorrente alla Sectio Altera della Segnatura Apostolica," in *Apollinaris* 55 (1982), pp. 752–779.

10. *AAS* 80 (1988), p. 1818.

11. *Comm.* 20 (1988), pp. 88–94.

the act (if it has violated some law that affects its validity) or the rescission of the act (if it has violated a law that does not affect its validity). The doctrine agrees in that it addresses the violation of any law, including the *aequitas canonica*. It should be noted that said illegitimacy also includes incompetence (insofar as it concerns the violation of law in the proceeding) and abuse of power (insofar as it concerns the violation of law in the deliberation). It appears that untrue motives are cited in the act also carry this illegitimacy; that is, the violation of law *in decernendo*.[12]

— the *reparation of damage* caused by the illegitimate act. To be an object of judgment by the Signatura, compensation for damages must be specifically requested. The request for compensation of damages must be proposed together with recourse relative to the illegitimacy of the act (and in the set term mentioned previously), not separately; that is, in an autonomous fashion.[13] As for the obligation to compensate, the Signatura should not examine a case if the damage caused was malicious or culpable (cf. c. 128). The Signatura should examine cases only where compensation is due to the administrative authority's violation of the law. The obligation to compensate falls on the office, not on the titular person . In any case, the problem of compensation for damages is complex overall in ecclesiastical administrative justice. Because this addresses principally moral damages that are difficult to compensate, and even difficult to specify, the legislative text is sparing. Therefore, it is up to jurisprudence and the doctrine to clarify many issues that are not completely clear.[14]

b) *Secondary competencies of the second section* (§ 3)

These competencies appear to be additions to the primary competency. They make up only a small part of the work of the second section. They are the following:

— *administrative controversies entrusted by the Roman Pontiff*: regarding this, see commentary on c. 1442: no. 2, c. The Holy Father can also entrust to the Signatura the judgment of cases regarding the heart of the dispute, in addition to the legitimacy of the act and the damages;

— *administrative controversies referred by the dicasteries of the Roman Curia*: the reason for this referral can be, for example, that the dicastery has already intervened in some way when addressing the dispute before the inferior authority, or that the dispute addresses a particularly difficult question of law;

12. Cf. Z. GROCHOLEWSKI, *I tribunali*, cit., p. 411.

13. In a different sense, G. MONTINI, "Il risarcimento del danno provocato dall'atto amministrativo illegittimo e la competenza del Supremo Tribunale della Segnatura Apostolica," in *La giustizia amministrativa nella Chiesa* (Vatican City 1991), p. 199.

14. Cf. Z. GROCHOLEWSKI, *I tribunali*, cit., pp. 408–411; G. MONTINI, "Il risarcimento...," cit., pp. 179–200.

— *conflicts of competence among the dicasteries of the Roman Curia*: regarding the concept of conflict of competence, see commentary on c. 1416; regarding the concept of dicastery, cf. *Pastor Bonus* 2: see above, no. 4, a.

6. *The Apostolic Signatura as the competent administrative organ in regard to the judicial forum* (*PB* 124)

This addresses a vast area of the duty of the Signatura.[15] The commentary follows the order of art. 124, keeping in mind that nos. 1°, 2° and 4° indicate two competencies each.

— *Vigilance over the proper administration of justice* (no. 1°). This is a general competence , in a certain sense, includes the competences follow. In reference to vigilance, the Signatura: *a)* examines the reports each ecclesiastical tribunal must send each year relating its status and activity and responds with its observations; *b)* sometimes requests and examines the decisions of a tribunal and responds with its observations; *c)* examines numerous recourses or reports that are presented before the Signatura against the proceedings of a certain tribunal, takes appropriate measures, and responds with its observations; *d)* sometimes studies the state of the administration of justice in a nation and responds with proposals or suggestions; *e)* responds to different matters laid out by the tribunals; *f)* issues declarations to counter specific irregularities or abuses in the administration of justice; *g)* in the case of a deficiency in the administration of justice, issues declarations of nullity of marriage through an administrative course, at least when a deeper disquisition or investigation is not required[16]; *h)* encourages the unity of jurisprudence in cases where the Holy Father has requested that the case of nullity of marriage be entrusted to the Apostolic Signatura for resolution ; *i)* collaborates in the initiatives directed at perfecting the actions of ecclesiastical tribunals; *etc.*

— *Measures against advocates and procurators* (no. 1°). Regarding abuses by advocates and procurators, see cc. 1488–1489. The Signatura does not necessarily act directly, but frequently invites the moderator (see

15. Cf. Z. GROCHOLEWSKI, "Linee generali della giurisprudenza della Segnatura Apostolica relativamente alla procedura nelle cause matrimoniali," in *Monitor Ecclesiasticus* 107 (1982), pp. 233–267; French translation, "Lignes générales de la jurisprudence de la Signature Apostolique en matière de procédure dans les causes matrimoniales," in *Revue de Droit Canonique* 32 (1982), pp. 35–73.

16. Cf. Z. GROCHOLEWSKI, "La facoltà del Congresso della Segnatura Apostolica di emettere dichiarazioni di nullità di matrimonio in via amministrativa," in *Investigationes theologico-canonicae* (Rome 1978), pp. 211–232; idem, "Dichiarazioni di nullità di matrimonio in via amministrativa da parte del Supremo Tribunale della Segnatura Apostolica," in *Ephemerides Iuris Canonici* 37 (1981), pp. 177–204; R. BURKE, "La procedura amministrativa per la dichiarazione di nullità del matrimonio," in *I procedimenti speciali nel diritto canonico* (Vatican City 1992), pp. 93–105.

commentary on c. 1419: no. 5 and to c. 1423: no. 9) of the tribunal to adequately occupy himself with the case. The Signatura also examines hierarchical recourse against the measures adopted by moderators toward advocates and procurators.

— *Petitions to obtain the commitment of the case to the Rota* (no. 2°). This addresses cases in which the Rota is not competent by law to hear a case, but the party requests that Rota reserve the case for itself. The legal disposition relative to this matter (c. 1444 § 2; *PB* 129 § 1,4°) speaks of the *Roman Pontiff*, who calls the case to himself and entrusts it to the Rota. The Holy Father does this through the Signatura, which by law is entrusted with this competence (see commentary on c. 1417: no. 1 *in fine*).

— *Other favors relative to the administration of justice* (no. 2°). Examples of other favors relative to the administration of justice are: *a)* the dispensation of academic titles for those who deal with cc. 1420 § 4, 1421 § 3, 1435 (see commentary on c. 1420: no. 10); *b)* the dispensation of some other procedural law; *c)* the commitment of a case to the tribunal is absolutely incompetent due to the grade (c. 1440). (Generally this deals with the commitment of the judgment of third or later grade of a case to a local tribunal, but it could also deal with the commitment of a case to a tribunal of first or second grade by law or by decree of erection is not competent to address cases of this grade); *d)* the healing of acts; *e)* special faculties; and *f)* other similar things.

— *The extension of competence of inferior tribunals* (no. 3°). The expression "inferior tribunals" refers to tribunals that are not of the Holy See. Competence can be extended only in the case of relative incompetence (see c. 1407 § 2); that is, incompetence due to territory (but not with respect to privileged persons such as those addressed in c. 1405: cf. c. 1406 § 2). It deals principally with cases in which there is a request for the faculty to be able to introduce the case in the first grade before a tribunal that is not competent by law, but it can also deal with the authority to appeal before a local tribunal different from the competent one, but able to judge cases in second grade. These extensions of competence can be referred to specific cases or to all cases of an ecclesiastical circumscription that is not in a condition to have a proper tribunal.

— *The approval, reserved to the Holy See, of the tribunal of appeals* (no. 4°). This approval refers to the tribunal that the metropolitan diocese, or the person who presides over a circumscription that is immediately subject to the Apostolic See, has designated as the forum of appeal for his own tribunal: cf. c. 1438,2°.

— *The promotion and approval of interdiocesan tribunals* (no. 4°). These tribunals are addressed in cc. 1423 and 1439 (see commentary on c. 1423, primarily no. 5). Frequently, the Signatura, conscious of the difficulties involved in the administration of justice in the local Churches,

proposes the erection of interdiocesan tribunals and helps the bishop to correctly orient the judicial organization to have a more effective administration of justice.

The Signatura also has certain administrative competencies related to the judicial forum, based in the "Agreement between the Holy See and the Italian Republic that contributes modifications to the Lateran Concordat," of February 18, 1984, art. 8, no. 2°[17]; in the Concordat with Portugal of May 7, 1940, art. 25;[18] and in the Concordat with the Dominican Republic of June 16, 1954, art. 16 § 2.[19]

7. *The law proper to the Apostolic Signatura* (*PB* 125)

After the *REU*, the Apostolic Signatura elaborated some *Normae speciales in Supremo Tribunali Signaturae Apostolicae ad experimentum servandae post Constitutionem Apostolicam Pauli PP. VI "Regimini Ecclesiae Universae,"* which were approved by Paul VI in March of 1968. The *Normae speciales* were not published in *AAS*, but rather in a separate fascicle, edited in Vatican City in 1968, and in different reviews (such as *Periodica, Apollinaris, Ius Canonicum*), collections of documents,[20] and book appendices.

These *Normae speciales* are no longer in effect, because the law for they were created ceased (cf. c. 33 § 2). However, while no new *Normae speciales* exist, and considering c. 19, the *Normae* are observed in a supplementary manner that is not contrary to the new law. It is now up to the Signatura to elaborate the new *Normae* (in addition to the art. 125, cf. also *PB* 35).

8. *Advocates*

With *Pastor Bonus* (arts. 183–185) and the last norms dictated regarding the issue[21]: *a)* The Consistorial Advocates and the Procurators of the Holy Apostolic Palaces,(who were proper advocates of the Signatura (*Normae speciales*, art. 6), have been replaced by the "Body of Advocates

17. *AAS* 77 (1985), p. 527; cf. also the "additional protocol," ibid., pp. 533–534.
18. *AAS* 32 (1940), p. 230.
19. *AAS* 46 (1954), p. 443.
20. Cf. E, SZTAFROWSKI, *Posoborowe prawodawstwo koscielne*, vol. II, fasc. 1 (Warsaw 1970), pp. 181–244; X. OCHOA, *LE*, vol. III (Rome 1972), cols. 5321–5332; I. GORDON-Z. GROCHOLEWSKI, *Documenta recentiora circa rem matrimonialem et processualem*, vol. I (Rome 1977), pp. 372–398.
21. JOHN PAUL II, M.P. *Iusti iudicis*, June 28, 1988, in *AAS* 80 (1988), pp. 1258–1261; SEC, *Ordinatio ad exsequendas Litteras Apostolicas "Iusti iudicis" motu proprio datas*, in *AAS* 82 (1990), pp. 1630–1634.

of the Holy See," assumes the patronage of cases in the name of the Holy See and of the dicasteries of the Roman Curia, before the ecclesiastical and civil tribunals (and evidently before the Signatura). *b)* A "List of Advocates before the Roman Curia" was instituted to sponsor cases before the Signatura and offer their services in hierarchical recourses before the dicasteries of the Roman Curia. In any case, the sponsorship of Rotal Advocates may also be exercised before the first section of the Signatura.

TITULUS III
De disciplina in tribunalibus servanda

TITLE III
The Discipline to Be Observed in Tribunals

INTRODUCTION

Piero Antonio Bonnet

Judicial function and the power necessary for its function

In the people of God, the juridical experience lives in the dynamism that makes the normative dimension into an unceasing and inexhaustible practice.[1] This transformation of the judicial rule into practice is an insuppressible experience of continuous communication between law and reality, which in this way are placed in continuous interaction. In fact, norms and practice have their constant and inevitable point of reference in man: the first, constructing itself; the second, embodied in its operational capacity. However, man is not only the foundation on which the static dimension and the matrix are constructed around what forms the dynamic dimension of juridical experience. Man is also the crucible in which a norm—which exists only to be put into practice—is transformed into practice. In reality, juridical experience lives its profound unity in the action of all operators of law, who are determined to understand the juridical rule, to give it value in the concrete dimension of daily life. To be translated into practice, a norm must adapt itself to subjective experience, passing from the extrinsically objective dimension to form part of man himself, who must manage to make it his own.

The application of the norm can be realized in a condition of certainty, whether real or presumed. All operators of law participate in this activity of normative realization in a state of certainty. This function, when exercised with certain characteristics of particular authority on the part of those invested with powers in the community, is administrative or executive. With that type of activity, the norm is realized in practice, consisting of acts that are prevalently and characteristically executive.

1. Cf. P.A. BONNET, "'Continuità' e 'discontinuità' nel diritto ecclesiale e nell'esperienza giuridica totale dell'uomo," in G. BARBERINI (Ed.), *Raccolta di scritti in onore di Pio Fedele*, I (Perugi 1984), pp. 31–54; and regarding the whole matter, idem, "Comunione ecclesiale e diritto," in *Comunione e disciplina ecclesiale. Atti del XXII Congresso dell'Associazione Canonistica Italiana, Aosta, 10–13 settembre 1990* (Vatican City 1991), pp. 49–86; also in *Monitor Ecclesiasticus* 116 (1991), pp. 49–86, and in P.A. BONNET, *Comunione ecclesiale, Diritto e Potere. Studi di diritto canonico* (Turin 1993), pp. 7–51.

The norm is also applied in circumstances in which there is no certainty with respect to the normative content. Instead, a state of uncertainty persists or is expected in its continuously becoming juridical practice. This condition is characterized by a potentially conflictive state, which is why the judicial[2] function can adopt a litigious appearance. The same juridical experience, in order to overcome the pathological moment of crisis and functionally experience the proper normality, postulates in these cases a function that above all knows how to carry out an activity—the procedure[3]—capable of leading to a result—the judgment[4]—which makes the norm certain (in itself as well as in the fact to which it must be applied) with a binding value, because it is an "act of authority, that is, of the will of the law formulated by the only authority that can formulate it,"[5] namely, the judge.

The ecclesial sense of the judicial function may seem sufficiently clear, and consequently its characteristic as a moment of application of canonical juridical experience in conditions of crisis, due to an actual or presumed uncertainty regarding the normative value that must be realized. This characteristic also manifests all its nature as an essentially interpretative activity. If one considers the need and the particular authority of the hermeneutics to which the human ecclesial normative is substantially reduced[6]—not without a peculiar autonomy—judicial interpretation must confine itself to a reading of the divine law that it is presented with by the human legislator, becoming an interpreter that is particularly authorized by this law, inasmuch as the judgment of the judge constitutes a type of special law for the specific situation.[7] Therefore, the judge is an interpreter also of the human law, which he must know how to understand in all its potentiality.

However, in interpretation, the judicial anchor in human positive law cannot be considered insurmountable. In fact, it *must* be surmounted in the very spirit of the system. This applies not only in cases in which human law does not express the divine, but also when the specific norm given by the human legislator, even embodying, along general lines, divine law, does not manage to express it with reference to a particular case because the case contains elements not considered by the legislator. In fact, even laws that express the divine norm may be insufficient when faced

2. Cf. P.A. BONNET, "Giurisprudenza, II) giurisprudenza canonica," in *Enciclopedia giuridica*, XV (Rome 1989), pp. 1–10 (of the entry). Cf. also, idem, *Il giudizio di nullità matrimoniale nei Casi speciali* (Rome 1979), pp. 78–103.

3. Cf. P.A. BONNET, "Processo, XIII) processo canonico: profili generali," in *Enciclopedia giuridica*, XXIV (Rome 1991), pp. 1–23 (of the entry).

4. Cf. P.A. BONNET, "De iudicis sententia ac de certitudine morali," in *Periodica* 75 (1986), pp. 61–100; idem, "Sentenza, IV) sentenze ecclesiastiche," in *Enciclopedia giuridica*, XXVIII (Rome 1992), pp. 1–8 (of the entry).

5. G. CHIOVENDA, *Principi di diritto processuale civile* (Naples 1965), p. 158.

6. Cf. P.A. BONNET, *Comunione ecclesiale...*, cit., pp. 49–86.

7. Cf. THOMAS AQUINAS, *S. Th.*, II–I, q. 67, a. 1 c.

with reality, due to a failure to consider some elements of the specific situation in the normative paradigm, which must be simplified. In these cases, the judge must separate himself from positivity if following it entails a violation of the divine norm to which the legislator has referred in his interpretation, which was reductive with respect to the more complex situation submitted to the consideration of the judge.[8]

But, under the irreplaceable guidance of positive law, if the case goes beyond it, better than against it—inasmuch as it is presumable that the legislator would also have decided something else in those cases, after having been able to consider the situation as a whole[9]—the constant effort of the ecclesial judge must tend towards a search for the divine law to be applied to the specific case. Thus, jurisprudence will provide a continuing control and an uninterrupted establishment of human law and the interpretation that this human law suggests from the divine norm.

If that is the meaning and scope of the judicial function, it is linked more with an unordained ministerial quality, of which the lay faithful are also capable,[10] rather than with an ordained ministerial quality, from the time in which, as specified by the Sacred Congregation for the Doctrine of the Faith in the Response of February 8, 1977: *dogmatice laici exclusi sunt tantum ab officiis intrinsece hierarchicis, quorum capacitas a receptione sacramenti Ordinis dependet.*[11] In fact, it is not easy to deduce the strictly hierarchical nature of a function that is substantially to explain canonical norms, albeit in their divine and human dual dimension, regardless of how much they are particularly authorized by reason of the persons among whom the process is presented.

Proof of this is found in norm V of the *motu proprio Matrimonial causes* of March 28, 1971, which has subsequently been established in c. 1421 § 2 (cf., with some variation due to the particular condition of the Churches of the Orient, c. 1087 § 2 *CCEO*): *Episcoporum conferentia permittere potest ut etiam laici iudices constituantur, e quibus, suadente necessitate, unus assumi potest ad collegium efformandum.* This provision, which derives from the new awareness of the laity brought about by Vatican II,[12] is in keeping with a broader context, in which, with an involvement of the laity in the development of the process that is much more incisive than that favored by the *CIC*/1917,[13] the "Copernican

8. Cf. THOMAS AQUINAS, *S. Th.*, II–II, q. 60, a. 5.
9. Cf. THOMAS AQUINAS, *S. Th.*, II–II, q. 67, a. 1 c.
10. Cf. P.A. BONNET, "La ministerialità laicale," in *Telogia e diritto canonico* (Vatican City 1987), pp. 104–106 and in *Studi in memoria di Giovanni Ambrosetti*, II (Milan 1989), pp. 532–534.
11. For an evaluation of that reply, cf. J. BEYER, "Iudex laicus vir vel mulier," in *Periodica* 75 (1986), p. 59 (but cf. ibid., also note 13).
12. Cf. P.A. BONNET, "De laicorum notione adumbratio," in *Periodica* 74 (1985), pp. 227–271; idem, "La ministerialità laicale…" cit., pp. 87–130 and 507–567.
13. Cf. e.g. cc. 1421 §2, 1424, 1428 §2, 1437, 1528, 1710, 1717 §1.

revolution" of ecclesial law that has shifted the focal point of the code from the hierarchy to the faithful becomes evident.[14]

The foundation offered for this innovation by the Code Commission, according to which that lay capacity proceeds *ex plenitude potestatis Sum Pontificis*,[15] is unconvincing. It seems that its origin, like that of any other power that is not hierarchical is, in light of the teachings of Vatican Council II, quite diverse.[16] Specifically, with baptism, one acquires a special *deputatio* in order to carry out sanctifying acts, a particular *deputatio* that involves a particular virtuality and therefore an extended capacity with confirmation[17] *ad mensuram Ecclesiae*. However, this origin, which lies in the sacraments of Christian initiation, must be completed, becoming ecclesial, through an insertion and an appreciation in the people of God, which allows for each of the faithful, with the attribution of a particular mission or a particular office,[18] participation in the sole mission of the Church, carrying it out in the multiplicity of ministries[19] with which each may be invested.[20]

The legislation promulgated by John Paul II has overcome the unjustified discrimination against women that existed in the fundamental innovation contributed by Paul VI in *motu proprio Causas matrimoniales*. However, the lack of a profound theological motivation on the part of the Code Commission has prevented "the negative position adopted in the past from being completely overcome" and has led to the sanctioning of a provision that contemplates only an "extraordinary substitution of the laity in the functions of the judge, solely *suadente*, as stated in c. 1421 § 2, *necessitate*."[21]

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14. Cf. P.A. BONNET, "il 'christifidelis' recuperato protagonista umano nella Chiesa," in R. LATOURELLE (ed.), *Vaticano II, Bilancio e prospettive 25 anni dopo 1962–1987*, Italian ed., I (Assisi 1987), pp. 471–492; also in P.A. BONNET, *Comunione ecclesiale...*, cit., pp. 53–78. Cf. idem, "Habet pro conditione dignitatem libertatemque filiorum Dei," in *Il diritto ecclesiastico* 92/1 (1981), pp. 556–620 and in *Diritto persona e vita sociale. Scritti in memoria di O. Giacchi*, II (Milan 1984), pp. 157–203; idem, "De omnium christifidelium obligationibus et iuribus (cann. 208–223)," in P.A. BONNET-G. GHIRLANDA, *De christifidelibus. De eorum iuribus, de laicis, de consociationibus. Adnotationes in codicem* (Rome 1983), pp. 19–52; idem, "Fedeli," in *Enciclopedia giuridica*, XIV (Rome 1989), pp. 1–11 (of the entry).

15. In *Comm.* 2 (1970), p. 189.

16. Cf. P.A. BONNET, "Una questione ancora aperta: l'origine del potere gerarchico nella Chiesa," in *Ephemerides iuris canonici* 38 (1982), pp. 62–121; also in P.A. BONNET, *Comunione ecclesiale..*, cit., pp. 133–189.

17. Cf. P.A. BONNET, "Confermazione," in *Digesto delle discipline pubblicistiche*, III (Turin 1989), pp. 350–355.

18. Cf. P.A. BONNET, "Ufficio, d) diritto canonico," in *Enciclopedia del diritto*, XLV (Milan 1992), pp. 680–696.

19. Cf. P.A. BONNET, "Persona fisica, II) diritto canonico," in *Enciclopedia giuridica*, XXIII (Rome 1991), pp. 2–8 (of the entry).

20. Cf. P.A. BONNET, "La ministerialità laicale...," cit., pp. 87–130 and 507–567.

21. R. BERTOLINO, *La tutela dei diritti nella Chiesa. Dal vecchio al nuovo codice di diritto canonico* (Turin 1983), p. 103.

CAPUT I
De officio iudicum et tribunalis ministrorum

CHAPTER I
The Duties of the Judges and the Officers of the Tribunal

1446 **§ 1. Christifideles omnes, in primis autem Episcopi, sedulo annitantur ut, salva iustitia, lites in populo Dei, quantum fieri possit, vitentur et pacifice quam primum componantur.**

§ 2. Iudex in limine litis, et etiam quolibet alio momento, quotiescumque spem aliquam boni exitus perspicit, partes hortari et adiuvare ne omittat, ut de aequa controversiae solutione quaerenda communi consilio curent, viasque ad hoc propositum idoneas ipsis indicet, gravibus quoque hominibus ad mediationem adhibitis.

§ 3. Quod si circa privatum partium bonum lis versetur, dispiciat iudex num transactione vel arbitrorum iudicio, ad normam cann. 1713–1716, controversia finem habere utiliter possit.

§ 1. All Christ's faithful, and especially bishops, are to strive earnestly, with due regard for justice, to ensure that lawsuits among the people of God are as far as possible avoided, and are settled promptly and without rancor.

§ 2. In the early stages of litigation, and indeed at any other time as often as he discerns any hope of a successful outcome, the judge is not to fail to exhort and assist the parties to seek an equitable solution to their controversy in discussions with one another. He is to indicate to them suitable means to this end and avail himself of serious-minded persons to mediate.

§ 3. If the issue is about the private good of the parties, the judge is to discern whether an agreement or a judgement by an arbitrator, in accordance with the norms of cann. 1713–1716, might usefully serve to resolve the controversy.

SOURCES: § 1: c. 1925 § 1; *NSRR* 75 § 1
§ 2: c. 1925 § 2
§ 3: c. 1925 §§ 1 et 3

CROSS-REFERENCES: —

COMMENTARY

Piero Antonio Bonnet

The duty to avoid litigation

The spirit of procedural canon law is not understood if the value of *postrema ratio* possessed by the procedural instrument in ecclesial law is not taken into account, as a function of the precedence of the faithful. In fact, within the ecclesial sphere, a trial must always be avoided whenever possible, either at the beginning, or by interrupting its progress through conciliation of the parties in conflict.

This requirement is clear if it is borne in mind that, in the people of God, charity constitutes the measure of the relationship with others typified by law.[1] Each of the faithful relates with others and with the Church according to the measure of charity, which shapes all ecclesial action. Therefore, this bond of charity constitutes the shaping rule of the juridical life of the people of God, to the extent of being a proper and original value of its law.[2]

For this reason, canon law stresses the ecclesial idiosyncrasy of a phenomenon such as procedural law, regardless of how much its absolute need is substantially irrefutable. In fact, the process is formally constructed on the concept of the dispute. It is true this concept no longer appears at the center of a formal definition, as in c. 1552 § 1 of the *CIC*/1917, which stated: *Nomine iudicii ecclesiastici intelligitur controversiae in re de qua Ecclesia ius habet cognoscendi, coram tribunali ecclesiastico, legitima disceptatio et definitio*. However, it is undeniable that the dispute continues to be the element on which the system rests, as seen in numerous canons in which the term "litigation" is used.[3] Nevertheless, on the

1. Cf. P.A. BONNET, "Carità e diritto: la dimensione comunitaria quale momento della struttura interna del diritto della Chiesa', in *Investigationes theologico-canonicae* (Rome 1978), pp. 75–98.
2. Cf. P.A. BONNET, "Eucharistia et ius," in *Periodica* 66 (1977), pp. 583–616.
3. Cf. for the *CIC* cc.: 1400 § 2, 1417 § 1, 1427 §§ 1 and 3, 1445 § 2, 1446 §§ 1–3, 1459 § 2, 1462 §§ 1 and 2, 1463 § 1, 1464, 1465 § 3, 1486 § 1, 1488 § 1, 1502, 1504, 1507 § 1, 1508 §§ 2 and 3, 1512,5°, 1513 §§ 1 and 2, 1514, 1515, 1516, 1518,1°, 1519 § 2, 1529, 1586, 1587, 1594, 1595 § 2, 1596 § 1, 1611,1° and 4°, 1620,8°, 1639 § 1, 1640, 1658 § 1, 1660, 1675 § 1, 1677 § 2, 1716 § 2, 1723 § 2, 1733 § 1.

other hand, one must note the extraordinary harmony of the first two paragraphs of c. 1446 (cf. c. 1103 *CCEO*) with the spirit of canon law. This manifests its exceptional importance for all procedural law.

Therefore, litigation is inconsistent with the character of communion of the people of God, when other means are practicable, regardless of how much the litigation is directed towards the search for truth. To avoid this controversial tendency, the judge must seek to achieve a settlement between the parties, although he may not impose it against their will. This is because the parties will not be effectively reconciled if the judge cannot persuade them of the truth about which they are contending. Both the Code and the *CCEO* move in this direction with coherent determination, not only with the fundamental norm in § 2 of c. 1446 (cf. c. 1103 § 2 *CCEO*), but also through other provisions. Among these are c. 1659 § 1 for the oral contentious process (cf. c. 1345 § 1 *CCEO* for the summary contentious process), c. 1676 (cf. c. 1362 *CCEO*) for causes of matrimonial nullity, and c. 1695 (cf. c. 1381 *CCEO*) for disputes relating to conjugal separation. Also worthy of mention are the provisions of c. 1733 (cf., with incisive variations, c. 998 *CCEO*) which provides for the establishment of a special conciliation organ by the bishops. In this regard, the norms of c. 1718 § 4 (cf., with unique changes, c. 1469 § 3 *CCEO*) and § 1,2° (significant changes are also presented by c. 1469 § 1 *CCEO*) are particularly paradigmatic. They refer, for criminal proceedings, to the provision of c. 1341 (cf. c. 1403 *CCEO*), with particular variations).

However, *a fortiori*, the process must be avoided with those "jurisdictional or judicial equivalents" that, by eliminating it from its birth, are especially in tune with ecclesial communion, and find their roots in the same Scripture.[4] A juridical discipline is outlined—which is not entirely fortunate—from these canonical measures for litigation referring to the private good in cc. 1713–1716 (and with one more careful, and therefore more effective, discipline in cc. 1164–1184 *CCEO*), to which § 3 of c. 1446 refers (cf. c. 1103 *CCEO*).

However, it is precisely in this sphere that canon law "becomes truly *ars boni et aequi*. It places before the annoyance and slowness of the trial, the convenience and elasticity of a procedure in which, for the rest, the fundamental juridical presuppositions that legitimate the process can be found: the dispute, the changeableness of the position of the trier, the public nature of the forms, full right to a defense."[5]

4. Cf. Mt 5:25, 18:15–17.
5. R. BERTOLINO, *La tutela dei diritti nella Chiesa. Dal vecchio al nuovo codice di diritto canonico* (Turin 1983), p. 123.

1447 **Qui causae interfuit tamquam iudex, promotor iustitiae, defensor vinculi, procurator, advocatus, testis aut peritus, nequit postea valide eandem causam in alia instantia tamquam iudex definire aut in eadem munus assessoris sustinere.**

Any person involved in a case as judge, promotor of justice, defender of the bond, procurator, advocate, witness or expert cannot subsequently, in another instance, validly determine the same case as a judge or exercise the role of assessor in it.

SOURCES: cc. 1571, 1613 § 1

CROSS-REFERENCES: —

COMMENTARY

Piero Antonio Bonnet

Function of the judge and other ministers of the tribunal

This commentary will focus on the judge, due to his predominant influence with respect to any other official in the canonical process. As Pius XII noted in his speech to the Roman Rota on October 2, 1944, "the *judge*, who is like justice incarnate ..., juridically verifies and establishes the truth and gives it legal value with respect to the fact that must be judged as well as in connection with the law that must be applied in the case. But the entire process is directed towards this objective of clarifying and serving the truth."[1] Therefore, the function of the other ministers of the tribunal also must be modeled on this function, albeit with differences due to the specific activity of each.

The function of the judge is none other than that of *ius iuste dicere* for the faithful. Isidore of Seville acknowledged this in a passage first set forth in the Decree of Gratianus[2] and later in the Gregorian decretals[3]: *Iudex dictus quasi ius dicens populo, sive quod iure disceptet. Iure autem disceptare est iuste iudicare: non est autem iudex si non est in eo iustitia.*[4]

1. In *AAS* 36 (1944), p. 283.
2. Cf. 23, c. 1.
3. Cf. *X* V, 40, 10.
4. *Etymologiae*, 18, 15, 6, in *Etimologías*, bilingual ed., Latin text, Spanish trans. and notes by J. OROZ RETA and M.A. MARCOS CASQUERO. *Introducción general* by M. Díaz and Díaz, vol. II (Madrid 1982), p. 402; cf. also 9, 4, 14, ibid., vol. I (Madrid 1982), pp. 776–778. Cf. A. STANKIEWICZ, *I doveri del giudice*, in P.A. BONNET–GULLO (eds.), *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), pp. 299–301.

However, given that justice[1] in specific case lives in the judge to the extent that he is able to penetrate the juridical and factual reality of the specific situation,[2] it must be affirmed that "the truth is the law of justice."[3] Consequently, as stressed by John Paul II in his address to the Tribunal of the Rota of February 4, 1980, "in all ecclesiastical processes, the truth must always be, from the beginning to the judgment, the foundation, mother and law of justice."[4] To follow this extremely difficult master path[5] of a justice that is truth, the judge can only have God before his eyes, as was noted at the first Ecumenical Council of Lyon, in a passage later incorporated into the *Liber* VI[6]: *Caveant ecclesiastici iudices et prudenter attendant ut in causarum processibus, nihil vendicet odium, nihil vel favor usurpet, timor exsulet, praemium aut expectatio praemii iustitiam non evertat. Sed stateram gestent in manibus, lances appendant aequo libramine, ut in omnibus quae in causis agenda fuerint, praesertim in concipiendis sententiis et ferendis, prae oculis habeant solum Deum illius imitantes exemplum, qui querelas populi tabernaculum ingressus ad Dominum referebat, ut secundum eius imperium iudicaret.*[7]

The procedural exercise of justice commits all who take part in the canonical process,[8] "like the members of a body, each of which certainly has his own function and activity. However, at the same time they are reciprocally coordinated and jointly arranged in order to achieve the final objective, which is that of the entire organism."[9]

Therefore, everyone in the process is a servant of the truth (see commentary on c. 1454). Nevertheless, among the servants of the truth who act in the canonical process, the judge is a privileged protagonist, who *divino intuitu et amore iustitiae,*[10] *usque ad prolationem sententiae debet universa rimar.*[11] In fact, the process is substantially in the hands of the judge, who concretely embodies justice when he orders its terms and methods, even when the stimuli of the parties have a considerable

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1. Cf. P.A. BONNET, *Sentenza, IV) sentenze ecclesiastiche*, in *Enciclopedia giuridica*, XXVIII (Rome 1992), pp. 1–8 (of the entry).
2. Cf. THOMAS AQUINAS, *S. Th.*, I, q. 21, a. 2 c.
3. PIUS XII, *Allocutio ad Praelatos Auditores ceterosque Officiales et Administros Tribunalis S.R. Rotae necnon eiusdem Tribunalis Advocatos et procuratores*, October 1, 1942, in *AAS* 34 (1942), p. 342.
4. In *AAS* 72 (1980), pp. 175–176.
5. Cf. *X* V, 1, 17.
6. *VI* II, 14, 1.
7. *Constitutio* XV, in CENTRO DI DOCUMENTAZIONE ISTITUTO PER LE SCIENZE RELIGIOSE, BOLOGNA (Ed.), *Conciliorum Oecumenicorum decreta*, 2nd ed. (Basel-Barcelona-Freiburg-Rome-Vienna 1962), p. 264.
8. Cf. the allocutions of PIUS XII, October 2, 1944 and of JOHN PAUL II, February 4, 1980, to the Tribunal of the Rota: in *AAS* 36 (1944), pp. 281–290 and 72 (1980), pp. 172–178, respectively.
9. PIUS XII, *Allocutio*, October 2, 1944, cit., p. 288.
10. *X* II, 20, 7.
11. *X* II, 22, 10.

impact.[1] As for the rest, all of this is evident from the principles that govern procedural initiative. Thus, except in private cases (in which the initiative of a party is necessary), the judge may always proceed ex officio once the causes have been legitimately presented. Moreover, the judge can always compensate for the negligence of the parties, to avoid a judgment that may do serious damage to justice and the truth (cf. c. 1452; cf. c. 1110 *CCEO*). In addition, the entire process is directed so that the judge may acquire the moral certainty of the truth[2] through a predominantly free assessment of the evidence (cf. c. 1608 § 3; cf. c. 1291 § 3 *CCEO*), while the evidence of the legally mandatory assessment is rather limited.[3]

Such a determining function[4] makes it impossible for the judge to be a judge at more than one instance, to not keep the parties from having access to another trial, carried out by other persons. That is an unavoidable legal right and an irreplaceable requirement of justice in the search for the truth.

However, it is not only the judge but anyone who has played an important role in the search for the truth in a prior instance who may, as provided in c. 1447 (cf. c. 1105 *CCEO*) *valide eandem causam in alia instantia tamquam iudex definire aut in eadem munus assesoris sustinere*. This is because each of them has helped build the truth that has been established in the judgment, thus becoming a bearer of a "truth of his" "that will usually be the objective truth or a part thereof, often considered from different points of view, colored with hues of each's temperament, perhaps with some distortion or even mixed with error."[5]

The notable role played by the judge can be better understood if it is borne in mind that each of the faithful has his or her own judge in the bishop, according to the principle forcefully affirmed by Vatican II in *De Ecclesia: Episcopi sacrum ius et coram Domino officium habent in suos subditos... iudicium faciendi* (*LG* 27 a). While it is true that the function and procedural initiative of the bishop[6] continues to be reviewed, the influence of the bishop in canonical procedure is easily verified.[7]

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1. Cf. e.g., regarding the *CIC*, cc. 1503, 1508 §2, 1513 §2, 1516, 1526, 1558, 1559, 1560, 1563 §2, 1570, 1592, 1593 §1, 1599 §2, 1600 §1,3°, 1602 §1, 1604 §2, 1606, 1645 §1,1°–3°.
2. Cf. P.A. BONNET, "De iudicis sententia ac de certitudine morali," in *Periodica* 75 (1986), pp. 61–100.
3. Cf. *AAS* 75 (1983), pp. 557–558. Regarding moral certainty, cf. P.A. BONNET, *De iudicis sententia...*, cit.; regarding the judge's evaluation of the proof, cf. P.A. BONNET, "Prova d) diritto canonico," in *Enciclopedia del diritto*, XXXVIII (Milan 1988), pp. 687–688.
4. Cf. P.A. BONNET, "Processo, XIII) processo canonico: profili generali," in *Enciclopedia giuridica*, XXIV (Rome 1991), pp. 12–13 (of the entry).
5. JOHN PAUL II, *Allocutio*, February 4, 1980, cit., p. 174.
6. Cf. A. VITALE, "La riforma del processo canonico," in *Il diritto ecclesiastico* 89/1 (1978), p. 324.
7. Cf. e.g., regarding the *CIC*: cc. 1420 §§1–2, 1421, 1425 §§2–3, 1435, 1436, 1457 §§1–2, 1488, 1649, 1692 §§1–2, 1699, 1700, 1707, 1717, 1718, 1733 §2, 1742 §1, 1743, 1745.

1448 **§ 1. Iudex cognoscendam ne suscipiat causam, in qua ratione consanguinitatis vel affinitatis in quolibet gradu lineae rectae et usque ad quartum gradum lineae collateralis, vel ratione tutelae et curatelae, intimae vitae consuetudinis, magnae simultatis, vel lucri faciendi aut damni vitandi, aliquid ipsius intersit.**

§ 2. In iisdem adiunctis ab officio suo abstinere debent iustitiae promotor, defensor vinculi, assessor et auditor.

§ 1. The judge is not to undertake the hearing of a case in which any personal interest may be involved by reason of consanguinity or affinity in any degree of the direct line and up to the fourth degree of the collateral line, or by reason of guardianship or tutelage, or of close acquaintanceship or marked hostility or possible financial profit or loss.

§ 2. The promotor of justice, the defender of the bond, the assessor and the auditor must likewise refrain from exercising their offices in these circumstances.

SOURCES: § 1: c. 1613 § 1; *PrM* 30 § 1
§ 2: c. 1613 § 2; *PrM* 30 § 2

CROSS-REFERENCES: —

COMMENTARY

Piero Antonio Bonnet

Duty of impartiality

When a trial cannot be avoided, the judge has the duty to administer justice, in accordance with his function as the first servant of the truth (see commentaries to cc. 1146, 1147, and 1457). Moreover, he is among all those who participate in the process *servus servorum veritatis*. But, that is truly *famae prodigus et proprii persecutor honoris*, as noted by the first Ecumenical Council of Lyon in a passage presented in the collection of decretals of Boniface.[1] The judge who rules in an overly demanding and

1. *VI* II, 14, 1.

totalitarian manner, forgetting that he is to serve the truth *contra conscientiam et contra iustitiam in gravamen partis alterius in iudicio quicquam fecerit per gratiam vel per sordes.*[2]

Paul VI, speaking to the Tribunal of the Rota on January 29, 1970, stressed that the judge "must possess considerable objectivity in the trial, and at the same time considerable impartiality, in order to be able to assess all the elements he has patiently and tenaciously come to possess, in order to then judge with imperturbable, impartial equidistance … Impartiality … involves profound and immovable fairness. Disinterest is necessary, due to the danger that in the courts there can be pressure from interests outside of the trial, corruption, politics, favoritism, etc. A diligence is needed, which takes to heart the cause of justice, with an awareness that it constitutes high service to Him who is just and merciful, *misericors et miserator et iustus, iustus iudex et iustus.*"[3] In this way, the judge will "reflect the very justice of God,"[4] based on the law of the truth.[5]

The judge's impartiality must be safeguarded canonically with guarantees capable of protecting the image of ecclesial justice against a crisis of confidence that a possible decline in impartiality could cause. However, impartiality cannot be protected with an excessive network of legal hindrances, which would be a fatal obstruction of justice. The administration of justice, in that it is the work of men directed towards other men, cannot claim to be modeled after absolute criteria that, because they are absolute, would not be human.

In § 1 of this canon (cf. c. 1106 § 1 *CCEO*), the Code considers cases in which it may be feared that the judge or other tribunal officials are not in a position of indifference with respect to the interests at play in the process, so that suspicions could be aroused regarding the impartiality of the trial. In other words, "the duty to maintain 'immutable impartiality' forces the judge to refrain from judging cases in which he could come to be in conditions of subjective incompetence, that is, lacking the legitimacy required in view of an objective impartiality, precisely to ward off the risk of any alleged position of interest."[6]

2. *Constitutio* XV, in CENTRO DI DOCUMENTAZIONE ISTITUTO PER LE SCIENZE RELIGIOSE, BOLONIA (Ed.), *Conciliorum Oecumenicorum decreta*, 2nd ed.(Basel-Barcelona-Freiburg-Rome-Vienna 1962), pp. 264–266

3. In *AAS* 62 (1970), pp. 112–113.

4. PIUS XII, *Allocutio ad Praelatos Auditores ceterosque Officiales et Administros Tribunalis S.R. Rotae necnon eiusdem Tribunalis Advocatos et procuratores*, October 2, 1945, in *AAS* 37 (1945), p. 256.

5. PIUS XII, *Allocutio ad Praelatos Auditores ceterosque Officiales et Administros Tribunalis S.R. Rotae necnon eiusdem Tribunalis Advocatos et procuratores*, October 2, 1944, in *AAS* 36 (1944), p. 283.

6. A. STANKIEWICZ, "I doveri del giudice," in P.A. BONNET- GULLO (Eds.), *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), p. 318.

The cases in which the judge or officer of the court must disqualify himself, indicated in § 1 of this canon, are those that manifest a connection between the judge or the officer of the court and the dispute in question, determined by reasons of consanguinity or affinity (in any degree in the direct line and up to the fourth degree of the collateral line), guardianship or tutelage, or close acquaintanceship. Moreover, there could be reasons of a serious personal confrontation, or of opposing interests, due to either a gain to ensure or a possible loss to prevent.

If, in these cases, the judge or other members of the court do not refrain, the *recusatio* can be filed, pursuant to c. 1449 § 1.[7]

7. The *CCEO* has no provision for this.

1449 **§ 1. In casibus, de quibus in can. 1448, nisi iudex ipse abstineat, pars potest eum recusare.**

§ 2. De recusatione videt Vicarius iudicialis; si ipse recusetur, videt Episcopus qui tribunali praeest.

§ 3. Si Episcopus sit iudex et contra eum recusatio opponatur, ipse abstineat a iudicando.

§ 4. Si recusatio opponatur contra promotorem iustitiae, defensorem vinculi aut alios tribunalis administros, de hac exceptione videt praeses in tribunali collegiali vel ipse iudex, si unicus sit.

§ 1. In the cases mentioned in Can. 1448, if the judge himself does not refrain from exercising his office, a party may object to him.

§ 2. The judicial Vicar is to deal with this objection. If the objection is directed against the judicial Vicar himself, the Bishop in charge of the tribunal is to deal with the matter.

§ 3. If the Bishop is the judge and the objection is directed against him, he is to refrain from judging.

§ 4. If the objection is directed against the promotor of justice, the defender of the bond or any other officer of the tribunal, it is to be dealt with by the presiding judge of a collegiate tribunal, or by the sole judge if there is only one.

SOURCES: § 1: c. 1614 § 1; *PrM* 31 § 1; PCIDSVC Resp. I, 1 iul. 1976 (*AAS* 68 [1976] 635)
§ 2: c. 1614 § 1; *PrM* 31 § 1
§ 3: c. 1614 § 2; *PrM* 31 § 2
§ 4: c. 1614 § 3; *PrM* 31 § 3

CROSS-REFERENCES: —

COMMENTARY

Piero Antonio Bonnet

The objection

The causes for filing the objection are those specifically[1] established in c. 1448 § 1 (see commentary), since the positive wording of this norm,

1. Cf. to the contrary, J.J. GARCÍA FAÍLDE, *Nuevo derecho procesal canónico (Estudio sistemático-analítico comparado)*, 2nd ed. (Salamanca 1992), p. 83; DE DIEGO-LORA, commentary on c. 1449, in *Pamplona Com.*

in connection with § 1 of c. 1449, seems to lead to this interpretation.[2] This is more true when an interpretation of the provisions of c. 1448 § 1 with specific examples would give rise to an interpretation that would present many negative aspects, because of abuses that could be encouraged with obstacles and delays, and little benefit for the administration of ecclesial justice.

Paragraph 2 of c. 1449 (cf., with a dispositive specificity, c. 1107 § 1 *CCEO*) establishes the competence to judge the objection: the diocesan bishop in charge of the tribunal, if the objection concerns the judicial vicar; in all other cases, the judicial vicar. However, if the matter concerns the promoter of justice, the defender of the bond, or another officer of the tribunal, pursuant to § 4 (cf. c. 1107 § 3 *CCEO*), the presiding judge of the collegiate court or the sole judge will handle the issue. Lastly, if the bishop is being recused, he must refrain from judging, pursuant to § 3 (cf. c. 1107 § 2 *CCEO*). The Code makes no provision for cases in which the diocesan bishop does not comply with this obligation. However, in these cases, the issue of the objection can be raised before the tribunal of the Roman Rota, by virtue of c. 1405 § 3,1°.[3]

2. The Code Commission also expressed itself in this sense: cf. *Comm.* 10 (1978), p. 251.

3. Cf., in this sense, J.J. GARCÍA FAÍLDE, *Nuevo derecho...*, cit., p. 85. For the Eastern Churches the competent tribunal would be, in virtue of c. 1060, § 2 *CCEO*, the one designated by the Roman Pontiff.

1450 **Recusatione admissa, personae mutari debent, non vero iudicii gradus.**

If the objection is upheld, the persons in question are to be changed, but not the grade of trial.

SOURCES: c. 1615 § 1; *PrM* 32 § 1

CROSS-REFERENCES: —

1451 **§ 1. Quaestio de recusatione expeditissime definienda est, auditis partibus, promotore iustitiae vel vinculi defensore, si intersint, neque ipsi recusati sint.**

§ 2. Actus positi a iudice antequam recusetur, validi sunt; qui autem positi sunt post propositam recusationem, rescindi debent, si pars petat intra decem dies ab admissa recusatione.

§ 1. The objection is to be decided with maximum expedition, after hearing the parties, the promotor of justice or the defender of the bond, if they are engaged in the trial and the objection is not directed against them.

§ 2. Acts performed by a judge before being objected to are valid. Acts performed after the objection has been lodged must be rescinded if a party requests this within ten days of the admission of the objection.

SOURCES: § 1: c. 1616; *PrM* 33

CROSS-REFERENCES: —

COMMENTARY

Piero Antonio Bonnet

Admission and judicial procedure of the objection

The issue argued between the party making the objection and the party being objected to (see commentary on c. 1449), must be resolved, as

provided in § 1 of c. 1451 (cf. c. 1109 § 1 *CCEO*), with maximum expedition (*expeditissime*). This involves hearing the parties, as well as the promoter of justice and the defender of the bond if they are present in the proceeding and are not the persons against whom the objection has been filed. The decision will usually be made by a decree that may not be appealed, in accordance with c. 1629,5° (cf. c. 1310,5° *CCEO*). However, depending on the case, a *querela nullitatis* and a *restitutio in integrum* may be filed against it.[1]

Once admitted, the objection entails the substitution of the person (c. 1450; cf. c. 1108 *CCEO*). Pursuant to c. 1451 § 2 (cf. c. 1109 § 2 *CCEO*), the acts of the person objected to are valid if performed before the objection is filed (an issue in dispute under the *CIC*/1917[2]), while those performed afterwards are rescindable at the request of a party within ten days of the admission of the objection. Once the objection is admitted, the acts of the judge are invalid (although the only norm stating this is c. 1109 § 2 *CCEO*), since the judge has been disqualified.

1. Cf. J.J. GARCÍA FAÍLDE, *Nuevo derecho procesal canónico (Estudio sistemático-analítico comparado)*, 2nd ed. (Salamanca 1992), p. 84; DE DIEGO-LORA, commentary on cc. 1450–1451, in *Pamplona Com.*

2. Cf. I. GORDON, *De iudiciis in genere*, I, *Introductio generalis. Pars statica* (Rome 1976), pp. 324–325.

1452 **§ 1. In negotio quod privatorum solummodo interest, iudex procedere potest dumtaxat ad instantiam partis. Causa autem legitime introducta, iudex procedere potest et debet etiam ex officio in causis poenalibus aliisque, quae publicum Ecclesiae bonum aut animarum salutem respiciunt.**

§ 2. Potest autem praeterea iudex partium neglegentiam in probationibus afferendis vel in exceptionibus opponendis supplere, quoties id necessarium censeat ad vitandam graviter iniustam sententiam, firmis praescriptis can. 1600.

§ 1. In a matter that concerns private persons exclusively, a judge can proceed only at the request of a party. In penal cases, however, and in other cases which affect the public good of the Church or the salvation of souls, once the case has been lawfully introduced, the judge can and must proceed ex officio.

§ 2. The judge can also supply for the negligence of the parties in bringing forward proofs or in opposing exceptions, whenever this is considered necessary in order to avoid a gravely unjust judgement, without prejudice to the provisions of Can. 1600.

SOURCES: § 1: c. 1618
§ 2: c. 1619; *SN* c. 134 § 1

CROSS-REFERENCES: —

COMMENTARY

Piero Antonio Bonnet

The duty to supply for the deficiencies of the parties (the distinction between public and private in the canonical process and the application in it of the distinction between the inquisitive principle and the preparatory principle)

Although the process is a mechanism for applying law, this unquestionable community function must be used to serve the faithful. In fact, the execution of objective law is carried out through the process, not for an abstract community entity, but for the specific individuals that make it up and that constitute the law's only reason for being. Its presence in the process fulfills an irreplaceable function that is not only individual, but also social. In fact, only the effective participation of the interested faithful can

guarantee a communally more harmonious application of law, and a more secure individuation of the truth.

To fully understand the function of an individual in the canonical process, it is necessary to consider that, in ecclesial law, there is a fusion between the community and the individual perspective, due to the perfect correlation between the individual good and the community good from the perspective of charity, by virtue of which the good of all is the good of each one, and the good of each one is the good of all.[1] From that perspective, the common good is nothing more than the practicability of the individual good, which cannot be achieved by the individual alone. Moreover, it is unburdened by any conflict with the good of others, due to the noneconomic nature of the good that must be pursued by the individual (the *ordinatio in Deum*, the salvation of one's own soul). Thus, on the one hand, there is the unique importance of the individual good in ecclesial law, inasmuch as *in Ecclesia singuli homines sunt propter Deum et propter se solum, nec bonum privatum ordinatur ad bonum totius, saltem praecise, nec principaliter.*[2] But, on the other hand, one can never forget the importance of the common good, within which is found only its more real meaning and scope, the *ordinatio in Deum* of each, in that, as indicated by Vatican II, *placuit...Deo homines non singulatim, quavis mutua connexione seclusa, sanctificare et salvare, sed eos in populum constituere, qui in veritate Ipsum agnosceret Ipsique sancte serviret* (*LG* 9). From this comes the fact that the position of each one in the process must be integrated with that of the other members of the ecclesial community.

In fact, individual good and community good are present in every situation submitted to the hearing of the judge, although one of these goods occasionally is stressed more than another. To be more precise, the common or public good has a highly important role in all those activities which sociality must put to use, directly or indirectly, to serve personal self-realization. On the other hand, personal good has a specific influence on the exercise of the freedom each must have to achieve spiritual salvation.

The roles played by the private good and the public good must be reflected in the procedural system,[3] more specifically determining, in the case of precedence of public good over private good, the intervention of the public parties[4] and the more thorough intervention by the judge.

1. Cf. P.A. BONNET, "Eucharistia et ius," in *Periodica* 66 (1977), pp. 583–616.
2. F. DE VITORIA, "De potestate ecclesiastica relectio secunda," no. 5, in *Obras de Francisco de Vitoria. Relecciones teológicas*, critical ed. by T. URDANOZ (Madrid 1960), p. 365.
3. Cf. cc. 1430, 1431 § 1, 1446 § 3, 1452 §1, 1481 § 3, 1532, 1536 §§ 1–2, 1559, 1598 §1, 1600 §1,1°, 1619, 1696, 1715 §1, 1728 § 1.
4. Cf. P.A. BONNET, "Processo, XIII) processo canonico: profili generali," in *Enciclopedia giuridica*, XXIV (Rome 1991), pp. 11–12 (of the entry).

Nevertheless, due to the absence of an effective comparison with the private good, it is usually impossible to identify causes in which the common good can be considered with certainty to take precedence. Outside the cases described by norms as public, such as matrimonial cases (cf. c. 1691; cf. also c. 1376 *CCEO*), cases of the separation of spouses[5] and criminal cases,[6] c. 1431 § 1 (cf. c. 1095 § 1 *CCEO*), the canons prefer to leave to the discretion of the diocesan bishop[7] the determination of when the public good may be in danger, as well as when the presence of the promoter of justice is needed, if it is not legally provided.

In conclusion, a careful assessment of the canonical process leads to a rejection of any unilateral individual or community interpretation. This is because the unquestionable social function of the normative action of the procedural instrument lives to the extent that it is put to use by each one of the faithful to overcome any crisis presented to law in the ceaseless becoming practice in daily life. That reading of the canonical judicial mechanism also explains why the ecclesial process always constitutes a response to the fundamental dialectic tension that animates every moment of the life of law: the tension between the unstoppable individual drive for freedom and the unrestrainable community pressure for equality.

The treatment of procedural initiative is discussed in this general context. One can identify the principles by which norms determine the persons in whose hands the various mechanisms of the process are found. For this purpose, the inquisitive principle and the preparatory principle are usually contrasted. But, it is necessary to note that the legislative choice between the inquisitive principle (in which "the judge, independently of the initiative of the parties, acquires ex officio knowledge of the facts") and the preparatory principle (which occurs "when the acquisition of knowledge of the facts in the trial cannot take place if not on the initiative of the parties"[8]) is due mainly to reasons of appropriateness. In fact, "neither one nor the other changes the nature of the phenomenon, because it is always an activity that takes place in the sphere of the instrument which is being used to satisfy the technical demands thereof. However, the difference does not affect the system for protecting the material interests involved, because what changes, on the basis of criteria of mere organizational appropriateness, is not the system of that protection, but only the use of the initiative of the judge ... or only of the party in a certain aspect or moment of the selected means."[9]

5. Cf. c. 1696; cf. also c. 1381,1–4 together with c. 1095 § 1 *CCEO*.
6. Cf. c. 1728 §1; c. 1471 § 1 *CCEO*.
7. Cf. P.A. BONNET, "Processo..." cit., p. 16 (of the entry).
8. V. ANDRIOLI, *Lezioni di diritto processuale civile*, parte I, 2nd ed. (Naples 1961), pp. 172–173.
9. T. CARNACINI, "Tutela giurisdizionale e tecnica del processo," in *Studi in onore di E. Redenti*, vol. II (Milan 1951), p. 760.

It is also necessary to specify that the inquisitive principle does not govern the birth, but the life of the process, no longer determining a particular way to constitute the various procedural mechanisms, but establishing to which subjects the control of those mechanisms must be attributed. Thus, when the process is constructed on the inquisitive principle, it will give rise to a procedural situation in which the judge does not have his hands tied in the reconstruction of acts that constitute the object of the process. This is because the legislator has found it appropriate to not conceive of the procedural mechanism in such a way that "the necessary authority for affirmation of the relevant facts and the contribution of the means of proving them" in not exclusively attributed to the parties. This is even truer because the idea the judge "must remain completely inactive just when it is a matter of obtaining the material that he is obligated to assess"[10] is not entirely consistent with the same jurisdictional function. That especially applies when the power to judge is limited to a judicial vicar, who constitutes a unit[11] with the diocesan bishop,[12] upon whom devolves the responsibility of full power in the service of everyone in the sphere of the *portio populi Dei* entrusted to him.

However, the full inquisitive power possessed by the judge in the canonical process[13] does not stifle the preparatory power of the parties,[14] which must be safeguarded from the time that no one knows the facts better than them. The effective interweaving of the two principles clearly appears in the fundamental criteria established in c. 1452 (cf. c. 1110 *CCEO*), although this norm does not clearly distinguish the double moment of the procedural initiative: that which takes place in the beginning of the process and that which takes place during its course.

Therefore, in the canonical process (aside from the time of its initiation, for which, pursuant to cc. 1501 and 1620,4° (cf. c. 1303 § 1,4° *CCEO*), the principle of *nemo iudex sine actore* applies), the ex officio initiative is added in causes concerning the public good to the initiative of a party, which is exclusive for causes related to the private good. This ex officio initiative belongs to the judge, who also has an effective power to substitute for the parties, to avoid a decision that may be seriously detrimental to truth and justice. Therefore, in the canonical process, a harmonious system has been built based on the interweaving of the inquisitive and preparatory principles. Nevertheless, one must "recognize the highly

10. T. CARNACINI, "Tutela giurisdizionale...," cit., p. 763.

11. Cf. P.A. BONNET, "Processo...," cit., p. 12 (of the entry).

12. Cf., regarding the judicial function of the bishop, P.A. BONNET, *Il processo di nullità matrimoniale nei Casi speciali* (Rome 1979), pp. 193–201.

13. Cf. PIUS XII, *Allocutio ad Praelatos Auditores ceterosque Officiales et Administros Tribunalis S.R. Rotae necnon eiusdem Tribunalis Advocatos et procuratores*, October 2, 1944, in *AAS* 36 (1944), p. 283.

14. Cf. P.A. BONNET, "Processo...," cit., pp. 16–17 (of the entry).

praiseworthy effort of the code legislator to pursue substantial 'fair' justice in every case and for having therefore foreseen the faculty of the judge to substitute for the parties, even in private causes, *ad vitandam*, as stated in c. 1452 § 2, *graviter iniustam sententiam* (that is, a judgment that is detrimental to truth and justice) weakens the preparatory principle."[15]

15. R. BERTOLINO, *La tutela dei diritti nella Chiesa. Dal vecchio al nuovo codice di diritto canonico* (Turin 1983), pp. 132–133.

1453 **Iudices et tribunalia curent ut quam primum, salva iustitia, causae omnes terminentur, utque in tribunali primae instantiae ultra annum ne protrahantur, in tribunali vero secundae instantiae, ultra sex menses.**

Judges and tribunals are to ensure that, within the bounds of justice, all cases are brought to a conclusion as quickly as possible. They are to see to it that in the tribunal of first instance cases are not protracted beyond a year, and in the tribunal of second instance not beyond six months.

SOURCES: c. 1620

CROSS-REFERENCES: —

COMMENTARY

Piero Antonio Bonnet

Duty of celerity

To ideally express justice, the canonical process must approach an ideal of celerity in complying with procedural actions. This is because *sicut recta et celeris iustitiae administratio fiduciam populi fovet, ita diuturnitas processuum diffidentiam nutrit, siquidem iustitia serotina...quamdam iniustitiam continet, praesertim in re matrimoniali, ubi...sententia etiam favorabilis, si nimis tardet, periculum est ne inutilis evadat.*[1] Moreover, Paul VI, in his address of January 11, 1965 to the Rota, indicated that "every blameworthy delay in doing justice or in executing it, caused by negligence or unrelated activities, is in itself an injustice that every member of the ecclesiastical courts must seek to avoid even from a distance."[2] This unquestionable demand for rapidity led the Commission in charge of the task of preparing the *Schemata* for a new Code to propose procedural celerity as a criterion shaping the new process[3]: *Recognitio iuris processualis, ut optatis omnium respondeat, hoc praestare debet, quod nempe iustitia tuto et celeriter administretur, quod unusquique de Populo Dei videre possit tuitioni suorum iurium per procedurale systema citatum et perspicuum.*[4]

1. I. GORDON, "De nimia processuum matrimonialium duratione," in *Periodica* 58 (1969), p. 506.
2. In *AAS* 57 (1965), p. 235.
3. Cf. P.A. BONNET, "Processo, XIII processo canonico: profili generali," in *Enciclopedia giuridica*, XXIV (Rome 1991), pp. 14–15 (of the entry).
4. In *Comm.* 2 (1970), p. 183.

Therefore, the process regulated by current legislation has been configured not only to be more agile, omitting formalities that no longer embodied the demands of justice,[5] but also quicker in its procedural development than the provisions of the *CIC*/1917. A basic principle of this approach is stated in c. 1453 (cf. c. 1111 *CCEO*). The judge, in order to not do harm to justice, must avoid allowing a cause to go on longer than necessary because of extensions (cf. c. 1466; cf. c. 1125 *CCEO*). Moreover, procedural rapidity is ensured through the prohibition on an appeal in cases in which an issue is being disputed that must be defined legally with the utmost urgency (cf. c. 1629,5°; cf. c. 1310,5° *CCEO*). However, procedural celerity is still largely in the hands of the judge, who must know how to blend the demands of the search for the truth with the demands of justice. In fact, except for the *fatalia legis*, established in norms for the lapsing of rights (c. 1465 § 1; cf. c. 1124 § 1 *CCEO*), all other terms may be extended by the judge *iusta intercedente causa ... auditis vel petentibus partibus* (c. 1465 § 2; cf. c. 1124 § 2 *CCEO*). In all other respects, the duration of the terms is often left up to the judge,[6] even if expressions such as *expeditissime, continenter, quam primum* are used.

The intent of the Code to resolve what constitutes one of the most serious problems in all juridical areas is more consistent with the spirit of ecclesial law than if only fixed terms were established,[7] even if protected by a system of sanctions.[8] This rigidity inevitably turns out to be annoying in many cases, to the point of constituting a reason for the faithful to feel indifferent towards the process. In fact, the Code has built a procedural system that, while appropriately safeguarding the requirements of the truth, also achieves a balance with respect to the duration, adequately guaranteeing the needs of justice. With useless formalism avoided in this way, the strength and at the same time the weakness of the system lies in the judge, especially in his gifts of juridical wisdom and balance, which cannot compensate for a lack of personnel or inadequate juridical and technical-professional preparation.

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5. Cf. P.A. BONNET, "Processo...," cit., pp. 17–18 (of the entry).
6. Cf. e.g., cc. 1449 § 4, 1451, 1519 § 2, 1527 § 2, 1589 § 1, 1596 § 3, 1601, 1603 §§ 1–2, 1682 § 2.
7. Cf. E. BERNARDINI, "Giudice unico o giudice collegiale in alcune proposte in vista della riforma del Codex Iuris Canonici," in *Ephemerides iuris canonici* 27 (1971), p. 352.
8. Cf. J. HERRANZ, "De principio legalitatis in exercitio potestatis ecclesiasticae," in *Acta conventus internationalis canonistarum* (Rome 1970), p. 233; also in *Studi sulla nuova legislazione della Chiesa* (Milan 1990), p. 132.

1454 **Omnes qui tribunal constituunt aut eidem opem ferunt, iusiurandum de munere rite et fideliter implendo praestare debent.**

All who constitute a tribunal or assist in it must take an oath to exercise their office properly and faithfully.

SOURCES: c. 1621; *PrM* 20

CROSS-REFERENCES: —

COMMENTARY

Piero Antonio Bonnet

All persons taking part in the canonical process (especially the judge) are servants of the truth in the process (see, for a development of this aspect, the commentary on c. 1447). The duty of loyalty to the office consists of this continuous service to the truth, *veritatem iuste dicere.* In fact, only this loyalty of everyone in the process allows "questions" posed "to be given a clear and respectful answer as demanded by the ... service to the truth."[1]

This duty is consecrated with an oath, which is contemplated in c. 1454 (cf. c. 1112 *CCEO*, although it speaks of *promissio*) for all persons participating in the process, especially the judge.

1. JOHN PAUL II, *Allocutio ad Tribunalis Sacrae Romanae Rotae Decanum, Praelatos Auditores, Officiales et Advocatos, novo litibus iudicandis ineunte anno,* February 4, 1980, in *AAS* 42 (1980), p. 178.

1455 **§ 1. In iudicio poenali semper, in contentioso autem si ex revelatione alicuius actus processualis praeiudicium partibus obvenire possit, iudices et tribunalis adiutores tenentur ad secretum officii servandum.**

§ 2. Tenentur etiam semper ad secretum servandum de discussione quae inter iudices in tribunali collegiali ante ferendam sententiam habetur, tum etiam de variis suffragiis et opinionibus ibidem prolatis, firmo praescripto can. 1609 § 4.

§ 3. Immo, quoties natura causae vel probationum talis sit ut ex actorum vel probationum evulgatione aliorum fama periclitetur, vel praebeatur ansa dissidiis, aut scandalum aliudve id genus incommodum oriatur, iudex poterit testes, peritos, partes earumque advocatos vel procuratores iureiurando astringere ad secretum servandum.

§ 1. In a penal trial, the judges and tribunal assistants are bound to observe always the secret of the office; in a contentious trial, they are bound to observe it if the revelation of any part of the acts of the process could be prejudicial to the parties.

§ 2. They are also obliged to maintain permanent secrecy concerning the discussion held by the judges before giving their judgement, and concerning the various votes and opinions expressed there, without prejudice to the provisions of Can. 1609 § 4.

§ 3. Indeed, the judge can oblige witnesses, experts, and the parties and their advocates or procurators, to swear an oath to observe secrecy. This may be done if the nature of the case or of the proofs are such that revelation of the acts or proofs would put at risk the reputation of others, or give rise to quarrels, or cause scandal or have any similar untoward consequence.

SOURCES: § 1: c. 1623 § 1
§ 2: c. 1623 § 2; *PrM* 203 § 2
§ 3: c. 1623 § 3; *PrM* 130 § 1

CROSS-REFERENCES: —

COMMENTARY

Piero Antonio Bonnet

Duty of the secret (secrecy and publicity in the canonical process)

The Pio-Benedictine process was unquestionably characterized by secrecy.[1] Moreover, secrecy was considered so inherent to the canonical procedure that it was stated that "some principles of modern judicial procedure are not applicable to the canonical process, such as the principle of publicity."[2]

In contrast to this rigid doctrinal position, the Code Commission stated *in optatis est ut tamquam regula generalis habeatur quod quilibet processus sit publicus, nisi iudex propter rerum et personarum adiuncta aestimaverit, certis in casibus, secreto esse procedendum.*[3] Therefore, with the Code promulgated by John Paul II in 1983, and with the *CCEO*, promulgated in 1990, a system more open to publicity has arisen.

One of the fundamental norms on which the entire system of secrecy is based is contained in c. 1455 (cf. c. 1113 *CCEO*). By virtue of this norm, the judges, as well as anyone who participates in the process *ad adiuvandum*, are bound by the professional secret of the office. It is "a secrecy entrusted under the express or tacit condition to observe it. It is seriously binding. It is more rigorous than natural secrecy and its observance must be urged because of the need for proper order in social life."[4]

This secrecy always affects penal cases. In contentious cases, it is limited to cases in which disclosure of the acts of the process may result in harm to the parties (§ 1). In addition, § 3 of c. 1455 (cf. c. 1113 § 3 *CCEO*) establishes that the judge may impose a special oath of secrecy on the parties, their advocates or procurators, the witnesses, and the experts, if disclosure of the acts may result in discord, scandal, or a similar problem. On the other hand, (and c. 1113 § 2 *CCEO* specifies *semper et erga onmes*), there is an obligation to keep secret the discussion between the judges of a collegiate court when arriving at a judgment, as well as votes and opinions that the judges have expressed (and c. 1113 § 2 *CCEO* specifies *ad hoc secretum tenentur etiam alii omnes, ad quos notitia de re quoquo modo pervenit*). However, if a judge does not want to be associated with the decision of the rest, he may ask, pursuant to c. 1609 § 4 (cf. c. 1292 § 4 *CCEO*), that his conclusions be sent to the higher court.[5]

1. Cf. F. DELLA ROCCA, "Processo canonico," in *Novissimo digesto italiano*, vol. XIII (Turin 1966), p. 1095.
2. M. CABREROS DE ANTA, "Reforma del proceso canónico," in *Ius Populi Dei. Miscellanea in honorem Raymundi Bidagor*, vol. II (Rome 1972), p. 631.
3. In *Comm.* 1 (1969), p. 83.
4. C. DE DIEGO-LORA, commentary on c. 1455, in *Pamplona Com.*
5. Cf. P.A. BONNET, "Sentenza, IV) sentenze ecclesiastiche," in *Enciclopedia giuridica*, XXVIII (Rome 1992).

On this need to maintain professional secrecy can be built the broad areas for publicity on which the canonical process rests, which constitute one of the fundamental points of reference for the parties' intangible right to defense in the cause.[6] Thus, c. 1508 § 2 (cf. c. 1191 § 2 *CCEO*) allows publicity of the libellus between the parties, but restricts it to being resent at the time of the party's deposition, if there are grave reasons.

By virtue of c. 1599 (cf. c. 1240 *CCEO*), the parties are allowed to be present, through their advocates and procurators, at the questioning of the other parties (c. 1534; cf. c. 1215 *CCEO*), the witnesses, and in matrimonial causes, the experts (c. 1678 § 1,1°; cf. c. 1364 § 1,1° *CCEO*), unless the judge has deemed that the proceeding should be in secret. However, it is absolutely prohibited for the parties to the cause to personally attend the questioning of other parties, witnesses, or experts (c. 1678 § 2; cf. c. 1364 § 2 *CCEO*).

In matrimonial causes, according to c. 1678 § 1,1° (cf. c. 1364 § 1,1° *CCEO*), the parties, through their advocates or procurators, can have knowledge before publication of the judicial acts and of the documents provided by the parties. Moreover, the judge, when closing the instruction phase, must decide by decree, pursuant to c. 1598 § 1 (cf. c. 1281 § 1 *CCEO*), under penalty of nullity, whether to publish the acts. This must also be done with any evidence later incorporated into the acts (c. 1598 § 2; cf. c. 1281 § 2 *CCEO*) and, if necessary, after the *conclusio in causa* (c. 1600 § 3; cf. c. 1283 § 3 *CCEO*), in such a way as to allow awareness of the acts by the parties and their advocates and procurators, who may also request a copy. However, this norm allows an exception: *In causis ... ad bonum publicum spectantibus iudex ad gravissima pericula evitanda aliquod actum nemini manifestandum esse decernere potest, cauto tamen ut ius defensionis semper integrum maneat.*

Therefore, from the provisions contained in c. 1589 § 1 (cf. c. 1281 § 1 *CCEO*) arises a difficult and delicate task for the judge: to reconcile the parties' right to defense, calling for publicity of the acts, with the equally basic interest in avoiding any disruption in the search for the truth, which could legitimize the tendency towards secrecy.[7]

Considering the current norms as a whole, a true and proper right of the parties to publicity of the acts of instruction involving evidence has been established, albeit with precisely defined limits. Moreover, precisely because it is "a true *ius*, no request is needed in order to obtain from the judge the granting of its exercise. On the contrary, the judge must determine when and why it cannot be exercised." Since the reasons that may prevent the exercise of this right are established in the norms "with

6. Cf. P.A. BONNET, "Processo, XIII) processo canonico: profili generali," in *Enciclopedia giuridica*, XXIV (Rome 1991), pp. 15–16 (of the entry).
7. Cf. P.A. BONNET, "Processo...," cit., pp. 6–11 (of the entry).

specific reference to the *adiuncta rerum et personarum*, they can be none other than the higher interest of justice ... and the respect due the rights of the person called to be deposed."[8]

Therefore, openness to publicity in the canonical process is obvious, although the norms have attempted to indicate caution, by imposing in the process secrecy that must be restricted within the rigorous limits of its essential need *ut ius defensionis semper integrum maneat*, according to the wording of c. 1589 § 1 (cf. c. 1281 § 1 *CCEO*).

8. S. VILLEGGIANTE, *Il diritto di difesa delle parti nel processo matrimoniale canonico* (Rome 1984), p. 40.

1456 Iudex et omnes tribunalis administri, occasione agendi iudicii, dona quaevis acceptare prohibentur.

The judge and all who work in the tribunal are forbidden to accept any gifts on the occasion of a trial.

SOURCES: c. 1624

CROSS-REFERENCES: —

COMMENTARY

Piero Antonio Bonnet

Prohibition against receiving gifts

To safeguard the primary duty of impartiality characteristic of the judge and other tribunal personnel (see commentary on c. 1448; cc. 1449–1451), as a reflection of their service to the truth (see commentary on c. 1454), there must be an obligation to reject any gift that may be offered to them on the occasion of the trial, even if it is lacking in commercial value.[1] This canon (cf. c. 1114 *CCEO*) confirms that obligation.

1. The current regulation does not match the former one in every regard (cf. *VI* I, 3, 11); cf. J.A. HICKEY, *De iudice synodali ac prosynodali* (Rome 1951), pp. 110–114.

1457 **§ 1. Iudices qui, cum certe et evidenter competentes sint, ius reddere recusent, vel nullo suffragante iuris praescripto se competentes declarent atque causas cognoscant ac definiant, vel secreti legem violent, vel ex dolo aut gravi neglegentia aliud litigantibus damnum inferant, congruis poenis a competenti auctoritate puniri possunt, non exclusa officii privatione.**

§ 2. Iisdem sanctionibus subsunt tribunalis ministri et adiutores, si officio suo, ut supra, defuerint; quos omnes etiam iudex punire potest.

§ 1. Judges can be punished by the competent authority with appropriate penalties, not excluding the loss of office, if, though certainly and manifestly competent, they refuse to give judgement; if, with no legal support, they declare themselves competent and hear and determine cases; if they breach the law of secrecy; or if, through deceit or serious negligence, they cause harm to the litigants.

§ 2. Tribunal officers and assistants are subject to the same penalties if they fail in their duty as above. The judge also has the power to punish them.

SOURCES: § 1: c. 1625 §§ 1 et 2
§ 2: c. 1625 § 3

CROSS-REFERENCES: —

COMMENTARY

Piero Antonio Bonnet

Duty to administer justice

In all cases in which trial cannot be avoided (see commentary on c. 1446), the judge has a fundamental duty to administer justice, meeting the vital demand for truth posed by the faithful.[1] Performing his duties in the service of the truth, the judge participates in the pastoral ministry to which Christ has wanted to associate, albeit at various levels,[2] each

1. Cf. P. FEDELE, "La responsabilità del giudice nel processo canonico," in *Ephemerides iuris canonici* 35 (1979), pp. 197–222.

2. Cf. P.A. BONNET, "Una questione ancora aperta: l'origine del potere gerarchico nella Chiesa," in *Ephemerides iuris canonici* 38 (1992), pp. 62–121; also in P.A. BONNET, *Comunione ecclesiale, Diritto e Potere. Studi di diritto canonico* (Turin 1993), pp. 133–189.

member of the faithful.[3] As noted by Paul VI to the Rota on February 8, 1973, for anyone who has had recourse to him, the judge "is ... the good Shepherd who comforts him who has been harmed, guides him who has gone astray, recognizes the rights of him who has been slandered, or unjustly humiliated. The judicial authority is therefore an authority of service, a service that consists of the exercise of the power entrusted by Christ to his Church for the good of the souls."[4]

Therefore, refusal to administer justice, as well as any grave infidelity to justice, is a betrayal of the ecclesial ministry of truth, which must be punished with just penalties. This is to serve as a sign of conversion for the transgressor and of teaching for the people of God.

This is what is stated in c. 1457 (cf. c. 115 § 1 *CCEO*). Because this canon is the only norm in the Latin Code (cf. c. 1104 § 1 *CCEO*) on this subject, "it is regrettable that the positive and pastoral duty ... to administer and do justice in the ecclesial community" is "dealt with in criminal norms, under the negative and criminal aspect, without taking into account the pontifical teaching on the duty 'of pastoral care in judicial activity', which is 'an integral and qualifying part of the pastoral office of the Church.'"[5]

Since service to the truth is organically unitary, the duty to render it binds all those who take part in the ministry of justice, as stressed in § 2 of c. 1457 (cf. c. 1115 § 2 *CCEO*).

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3. Cf. PAUL VI, *Allocutio ad Praelatos Auditores et Officiales Tribunalis Sacrae Romanae Rotae a Beatissimo Patre novo litibus iudicandis ineunte anno coram admissos*, February 8, 1973, in *AAS* 65 (1973), pp. 100–101.
4. Ibid., p. 101.
5. A. STANKIEWICZ, "I doveri del giudice," in P.A. BONNET-C. GULLO (eds.), *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), p. 304.

CAPUT II
De ordine cognitionum

CHAPTER II
The Ordering of the Hearing

1458 **Causae cognoscendae sunt eo ordine quo fuerunt propositae et in albo inscriptae, nisi ex iis aliqua celerem prae ceteris expeditionem exigat, quod quidem peculiari decreto, rationibus suffulto, statuendum est.**

Cases are to be heard in the order in which they were received and entered in the register, unless some case from among them needs to be dealt with more quickly than others. This is to be stated in a special decree that gives supporting reasons.

SOURCES: c. 1627

CROSS REFERENCES: cc. 197, 484–488, 1414, 1437, 1451, 1453, 1457, 1459–1464, 1589, 1690 § 2

COMMENTARY

Carmelo de Diego-Lora

1. This canon opens the chapter entitled *De ordine cognitionum*. As stated in a prior commentary on this canon, "this hearing consists of examining the petition in order to accept to reject it, in instructing the case, attending to what the litigants allege or discuss, and solving doubts with a judicial decision. The ordering of the hearing means hearing contentious matters in order, according to specific norms of procedural law. It is the responsibility of the judge to decide on the priority of cases to be studied by the court according to the norms or to see that the order is followed."[1]

1. J. CALVO-L. DEL AMO, commentary on c. 1458, in *Pamplona Com.*

Therefore, there are three elements to be highlighted: the hearing itself, the order in which it must be heard, and the attribution to the judge or tribunal receiving the petition of the power to enforce these norms ordering the procedural activity, beginning with the judge or tribunal's duty to comply with these norms ordering the activity to the extent that these norms affect them.

In fact, the process order is regulated not only by the canons of this chapter (cc. 1458–1464), but by all the canons of book VII that establish provisions on the path taken by the judge, parties, and third parties taking part in the various proceedings. They are norms that must aptly be described as procedural. This term cannot be confused with process (see introduction to book VII, *De processibus*), a broader concept which includes not only the progress of the activity of the process, but also the substantive elements of the process, which constitute its inner framework for a just solution of the specific case. These substantive elements (the object of the process, the capacities and standings of the parties, and the adjudged matter) do not belong to the order of hearing that c. 1458 references.

Therefore, this chapter contains provisions that are merely procedural, which also are only some very limited aspects, even if they may be important to the process, as are the times in which exceptions, counterclaims, and other motions incidental to the case in chief must be filed and how they must be resolved. On the other hand, the order of proceeding includes the hearing process in its entire scope, from the time the petition is presented to the judge until its admission or rejection; and if admitted, until the judgment is pronounced, and then, through other recourses, the adjudged matter effect is achieved. There is still some lack of proportion between the terms with which the heading *De ordine cognitionum* is expressed and the normative scope of the following canons.

2. Canon 1458 provides an order for hearing each process, taking into account the time in which the petition that originates it is presented. Each process has a proper time for being initiated and for the development of its proceedings until final judgment. Once initiated, each process shall follow its own procedural order, under the power of the judge, who shall order its development according to the order and the times provided in the *CIC* for each type of process.

For that order to be maintained, each case must be registered in a timely manner. The canon does not say how such a register must be organized or what information must be recorded. However, the expression *in albo inscriptae* suggests that the information must be entered on clean pages, especially prepared to receive the precise indications for easy identification of each cause. The most common way of making these entries would be a book intended exclusively for this purpose. In fact, this canon has been praised in relation to its precedent, c. 1627 of the *CIC*/1917,

"because it adds the requirement of entry in the register-book of causes received or protocol."[2]

Information that may be of interest includes the designation of the litigants and their procurators, if the litigants are acting through representation; the type of process proposed with the petition; and a generic description of the object of the litigation. Each entry should be dated and should indicate the day and time the petition is presented in the respective court or tribunal. This second date is particularly important, especially when the presentation of the petition interrupts a term for the prescription of rights and actions (c. 197). Like every public act of registration, in order to constitute public proof, it must be drafted and authenticated under the signature of the judicial notary (c. 1437). The norms on the care of documents, archiving, and the issuance of certified copies in cc. 484–488 shall also apply to the case entry. Moreover, the judicial notary must send a receipt of the petition's presentation by the petitioner or his or her procurator, once the petition is received, and before notifying the judge or presiding judge of the court, if the person who presented it requests this. The receipt must bear his signature and seal and indicate the day and time it is entered in the office of the court clerk.

These norms for entering and registering petitions in the office of the court clerk are disciplinary norms for the court and for the person holding the office of notary. If either the court or the notary fails to comply with these duties, they may incur some of the sanctions contemplated in c. 1457.

3. When the canon says that *causae cognoscendae sunt eo ordine quo fuerunt propositae*, it does not refer to each cause of action, but to each judicial cause or process, as the word *cause* is used in the *CIC* to indicate processes of nullity of marriage, nullity of sacred ordination, or separation of spouses. Therefore, once the petition is received and entered in the register, each process will be accorded its proper pace, according to the type of process. Once the petition is admitted, the judge must pronounce the appropriate decrees, so each process is completed within the time established in c. 1453.

In processes, there is no reason for them to cross or interfere with each other within each tribunal. Each one will have its own pace, according to its type and importance. However, it may occur that one court or tribunal has such an accumulation of cases that it is morally impossible for it to handle and resolve each process with the same care at the same time as the processes in progress. In view of this difficulty, the second paragraph of the canon presents a proviso regarding certain judicial causes that must be heard and resolved with preference over others, which may be prejudiced thereby. Here it is a matter of different causes that influence each

2. Ibid.

other, but never concerning the specifics of their procedural handling or to any actions that are exercised in either cause. To postpone handling some judicial cases in favor of others, the canon provides that the judicial organ must pronounce a special decree giving reasons. To provide this rapidity, since it will be in detriment to the speed of other processes, it is insufficient to state in that decree the reason why faster processing is required. The decree must also indicate which process will be affected in their progress by the judge's use of the proviso in c. 1458.

Roberti considers which causes need special treatment with more celerity, and believes that they are the causes that affect the public good of the Church, as occurs with matrimonial causes, due to the danger to the soul that is usually involved; criminal causes to restore the social order that has been violated; cases involving minors; and causes involving dispossession. Roberti also includes connected causes (c. 1414) and, in some cases, causes resulting from a counterclaim.[3]

Preference should also be considered for documentary processes of nullity of marriage, the simplification of which regarding evidence denotes the interest that the *CIC* shows in its speedy handling. One may add incidental causes, especially those that must be resolved by decree (cc. 1590 and 1591), particularly when the incidence is detrimental to a resolution of the main issue. Moreover, every incidental matter arising as a result of the filing of a dilatory exception or mixed exception filed as a dilatory exception (cc. 1459, 1460 and 1462) will warrant this preferential treatment, as well as any incidental matters arising from a recusal of judges and other officers of the court (c. 1451).

In any event, preferential treatment due to speed requirements of a given process with respect to others must be considered an exceptional event that must be viewed in a context of accumulation of several matters in a given court and the fact that it is morally impossible for the judge to handle all of them, each within its own procedural channel and with its own pace, at the same time.

3. Cf. F. ROBERTI, "De processibus," I, in *Civitate Vaticana* 1956, pp. 438–440.

1459 **§ 1. Vitia, quibus sententiae nullitas haberi potest, in quolibet iudicii statu vel gradu excipi possunt itemque a iudice ex officio declarari.**

§ 2. Praeter casus de quibus in § 1, exceptiones dilatoriae, eae praesertim quae respiciunt personas et modum iudicii, proponendae sunt ante contestationem litis, nisi contestata iam lite emerserint, et quam primum definiendae.

§ 1. Defects which can render the judgement invalid can be proposed as exceptions at any stage or grade of trial; likewise, the judge can declare such exceptions ex officio.

§ 2. Apart from the cases mentioned in § 1, exceptions seeking a delay, especially those that concern persons and the manner of trial, are to be proposed before the joinder of the issue, unless they emerge only after it. They are to be decided as soon as possible.

SOURCES: § 1: c. 1628 § 2
§ 2: c. 1628 § 1; *PrM* 27 §§ 1 et 3

CROSS REFERENCES: cc. 19, 1430, 1437, 1449–1451, 1452 § 2, 1491, 1511, 1588, 1589 § 1, 1590, 1592, 1619, 1623, 1625, 1626 § 2, 1627, 1642 § 2, 1669, 1690

COMMENTARY

Carmelo de Diego-Lora

This canon has two distinct paragraphs, which nonetheless have some elements in common. Not only are the phenomena described in §§ 1 and 2 both contemplated as exceptions, but both affect the process as dilatory exceptions, even if this adjective is used exclusively in the situations of § 2.

These are procedural norms ordering the handling, hearing, and judicial resolution of the exceptions proposed. For more on the concept of an exception, its types, the effects of the various forms of exceptions, it is necessary to refer to the parts of the *CIC* in which these matters are dealt with more thoroughly (see introduction to tit. V, *De actionibus et exceptionibus*, and commentaries on cc. 1491 and 1492). This canon only highlights at what point in the proceedings the exceptions described therein

can be proposed, whether their ex officio consideration by the judge or tribunal is appropriate or if, on the other hand, the initiative by a party is necessary, and how and when they must be decided.

1. *Exceptions described in § 1*

a) These are exceptions based on defects *quibus sententiae nullitas haberi potest.* Causes regarding the nullity of judgments are enumerated in cc. 1620 (nullity due to an irremediable defect) and 1622 (nullity due to a remediable defect). The fourteen defects of nullity that are enumerated are procedural defects that, contemplated from the judgment, entail its nullity through the proposition of the *querela nullitatis*, either by accumulating it with the appeal (c. 1625), or filing it independently at an appropriate time (cc. 1621 and 1623). There can even be a *confused* rectification (*retractare vel emendare*, according to c. 1626 § 2) within a given term, by the same judge who pronounced it.

It is appropriate to stress its characteristic of being a procedural exception, by virtue of the nature of the defect that gives rise to it. Even some defects of nullity of the judgment, which would by their nullity affect the nullity of the judgment (e.g., nullity because of an illegitimate citation on the respondent (c. 1511), or the notary's failure to sign the judicial acts (c. 1437)) are included in the cause of c. 1622,5°, always sharing in the characteristic of being a procedural exception. Regardless of whether this type of defect of nullity can be confirmed pursuant to c. 1619, if it is a process that concerns the private good of persons, as long as this process is in a proceeding on the defect of nullity, it may be the object of the exception, pursuant to c. 1459 § 1.

b) Procedural exceptions that, because of the alleged defect, affect the nullity of the judgment, can be claimed as an exception, but can also *a iudice ex officio declarari.*

In this regard, c. 1459 follows the same criterion that c. 1642 § 2 applies for the *rei iudicatae* exception. This judicial initiative, in the ex officio consideration of certain exceptions, is an innovation of the *CIC*, resulting from the legislature's desire to give the judge a more primary role in the process, which has its more complete version in c. 1452 § 2. In this canon, the judge is granted the authority to propose exceptions, provided that he deems it necessary to avoid a seriously unjust judgment, although this norm presents this authority as a measure of the judge to make up for negligence by the parties.

The proper exception referred to in c. 1491 is a procedural right of parties that may be considered by the judge only if duly claimed. However, this concept is being phased out in canon law in favor of improper exceptions, which become functional because of the efficacy that law affords them or because it devolves upon the judge to take them into account if he

finds that they apply. In the dialectics between party initiative—ex officio initiative, current canon law favors the latter, even if it must be exercised within a sphere limited by certain conditions.

c) The moment at which they must be proposed by a party, or proposed ex officio by the judge, can be any phase or grade of the trial. In their exercise, they are not subject to any preclusive term, and, until there is a final judgment, the proposition can be made at any grade of the trial. This will occur when defects that may affect the nullity of the judgment occur in a cause that only relates to the good of private persons. Remedying, through the judgment, nullities of procedural acts established by positive law (c. 1619) must be understood as remedying through a final judgment. This is because, until the cause is handled, it is susceptible to an exception of a possible defect of nullity of judgment exercised or proposed, pursuant to c. 1489.

The canon says nothing about how and when it must be decided. However, this type of procedural exception is dilatory, because the process cannot continue from the moment at which the exception of nullity is claimed or proposed. Therefore, they are always pre-judicial exceptions, which paralyze the procedural activity until the issue is resolved. It would contradict the very concept of a judgment to allow the matter to reach judgment when it is known that there is a possible risk of nullity. To continue the procedural activity until the pronouncement of a potentially null judgment would also go against the principle of procedural economy.

As for how, if in the course of the process there arises an issue such as that under discussion, in the absence of a specific legal provision, one must turn to laws provided for similar cases (c. 19). These laws are none other than the laws of incidental causes, which may be presented at any stage of the process. Canon 1627 allows defects of nullity of judgments that give rise to the *querela nullitatis* to be challenged through the oral contentious process. Moreover, with regard to incidental matters, c. 1589 provides that one of the decisions that must be made by the judge when admitting the incidental matter is whether it must be resolved by an interlocutory judgment or by decree (c. 1589 § 1), depending on the importance of the issue. If it is to be resolved by a judgment, it will follow, in principle, the norms of the oral contentious process (c. 1590 § 1). This will occur even when the judge raises the exception ex officio. In this case, the judge must inform the promoter of justice, because, given that a procedural law has supposedly been violated, it will affect the public good, which it is his duty to protect (c. 1480). Art. 16 § 1 of *PrM* was clear in this regard: *Promotor iustitiae intervenire debet... ubi de lege processuali tutanda agitur.* In this way, even if the exception is proposed ex officio, its hearing and trial, if proposed and defended by the promoter of justice, will not suffer from the partiality that may be involved if it is the judge himself who serves notice thereof or proposes it, processes it, and decides it.

Lastly, in that it is an incidental matter, there is no doubt that the competent judge is the same judge as in the case in chief (c. 1588).

2. *Exceptions of § 2*

The canon describes these exceptions as dilatory exceptions. They should also be called procedural exceptions, taking into account the examples used by this norm: exceptions *quae respiciunt personas et modum iudicii*. Canon 1459 § 2 was directly inspired by c. 1628 § 1 of the *CIC*/1917.

Among these exceptions, Roberti, echoing Roman law, included incompetence, suspicion, defects *personae standi in iudicio*, and all those exceptions that should be proposed before the joinder of issue, such as those involving the capacity of the procurator or the mandate received, those connected with guaranties, and defects in the libellus.[1] In fact, many of these exceptions, which were deemed pre-judicial, are included in c. 1459 § 1. Those that refer to the litigants, to defects in the mandate, and the mode of the trial (cf. cc. 1669 and 1690), are included, with respect to their possibilities, in one of the fourteen phenomena of nullity of judgments in cc. 1620 and 1622.

Consequently, § 2 of this canon is a residual norm for situations not specifically contemplated in § 1, on which preliminary exceptions can be raised, which must be proposed before the joinder of the issue. These exceptions may not always be procedural, but also substantive, such that their presentation is subject to preclusion: if at a later time they should be claimed, they would be rejected by the judge before whom they are proposed. This would occur, for example, with a lack of competence when it is not absolute (c. 1460), or with the suspicion exception (c. 1448), or with any exception other than those of c. 1462 § 1, which could hypothetically be proposed, such as the exception of contract noncompliance or an obligation pending a term or condition; but, in that it is believed to give rise to a pre-judicial issue, it must be proposed as a preliminary issue before the *litis* is answered. These exceptions could not be posed ex officio by the judge.

If they concern relative competence, these exceptions would be handled pursuant to c. 1460, and if they concern suspicion, pursuant to cc. 1449–1451. In other situations, competence, handling, and resolution comply with what was stated for the exceptions of § 1.

Lastly, despite the preliminary nature of the exceptions of § 2, the possibility is foreseen that they will be proposed late if they arise after the

1. Cf. F. ROBERTI, "De processibus," I, in *Civitate Vaticana* 1956, p. 441, note 2, no. 1.

petition is answered. This norm only adds that they must be decided as soon as possible: *quam primum.*

In these cases, the importance of the matter raised as a dilatory exception will determine if the court, when receiving the incidental issue, will decide to resolve it by decree or by judgment (c. 1589 § 1). If it selects the decree, with a suspension of the case in chief at the time this exception is admitted, it will be pursuant to the provisions of c. 1590 § 2. On the other hand, if it chooses a judgment, the court will follow c. 1590 § 1.

1460 **§ 1. Si exceptio proponatur contra iudicis competentiam, hac de re ipse iudex videre debet.**

§ 2. In casu exceptionis de incompetentia relativa, si iudex se competentem pronuntiet, eius decisio non admittit appellationem, at non prohibentur querela nullitatis et restitutio in integrum.

§ 3. Quod si iudex se incompetentem declaret, pars qua se gravatam reputat, potest intra quindecim dies utiles provocare ad tribunal appellationis.

§ 1. If an exception is proposed against the competence of the judge, the judge himself must deal with the matter.

§ 2. Where the exception concerns relative non-competence and the judge pronounces himself competent, his decision does not admit of appeal. However, a plaint of nullity and a total reinstatement are not prohibited.

§ 3. If the judge declares himself non-competent, a party who complains of being adversely affected can refer the matter within fifteen canonical days to the appeal tribunal.

SOURCES: § 1: c. 1610 § 1
§ 2: c. 1610 § 2; *PrM* 28 § 1
§ 3: c. 1610 § 3; *PrM* 28 § 2, 29

CROSS REFERENCES: cc. 1405–1415, 1416, 1459, 1461, 1505, 1512,2°, 1517, 1588, 1589, 1590, 1618, 1619, 1620,1°, 1630 § 1, 1641, 1645 § 1

COMMENTARY

Carmelo de Diego-Lora

1. Paragraph 1 of this canon establishes a competence rule not provided in cc. 1405–1415. It regulates the competence of the judge or tribunal called to hear the non-competence exception when it is presented by the respondent, pursuant to the provisions of c. 1459.

This exception can be proposed because it is believed that the judicial organ is not competent, because it is understood that the cause initiated is subject to rules of absolute competence, not attributed to the organ that admitted the petition (c. 1406 § 2). Should this defect be present, it will result in the nullity of the whole procedure, and the

judgment pronounced will be null with irremediable nullity (c. 1620,1°). In this case, the exception of non-competence can be proposed at any stage in the process or, as stated in c. 1459 § 2, at any stage or grade of the trial, since it must be declared ex officio by the judge (c. 1461).

On the other hand, when what is challenged is the fact that the judge admitted the petition although he was not relatively competent, this challenge must be proposed as a dilatory exception before the answer to the petition. In principle, despite the validity of the proceedings, the respondent is justified in opposing this competence, but only at the point in the proceedings established in c. 1459 § 2. Once the opportunity in the process for stating this dilatory exception passes, the respondent is subject to the competence chosen by the plaintiff and accepted by the judge who has been invoked and who decreed the admission of the petition. In these cases, it is lawful to deem that a tacit extension of competence has been made in favor of the judge.

It is an exception due to lack of absolute competency, or a dilatory exception due to a defect in the attribution of relative competency, which § 1 of the canon establishes as a rule of competence for hearing these exceptions in favor of the judge who was in principle recognized and has been acting as such. Nonetheless, there is some uneasiness with the fact that the judge chosen by the petitioner, who has taken over the cause in admitting the petition after citing the respondent, would be the one to hear and decide on the dilatory exception of relative non-competence.

The effect of the judge making the case his own, after citing the respondent, must be understood within the limit established in c. 1512,2°: the judge or tribunal makes it his own provided that he is competent. However, this competence is pending the possibility that the respondent will pose the dilatory exception of relative non-competence at the appropriate stage in the proceedings, or that the judge will present an exception or find ex officio absolute non-competence. Thus, the judge does not make the case his, due to relative competence, as long the dilatory exception is not proposed and the *litis contestatio* is given when an exception of relative non-competence has not been previously exercised. On the other hand, if it is absolute non-competence, the judge who unduly admitted the petition does not make the case his under any circumstance, even if he has cited the respondent.

On the other hand, the fact that the same judge or tribunal that has been hearing the cause is competent to judge the dilatory exception of relative non-competence is more than an effect common to all dilatory exceptions proposed pursuant to c. 1459. This is because this type of exceptions generates incidental issues with prior and special pronouncements, which demand a suspension of the case in chief to handle the incidental matter. As provided in c. 1588, every incidental matter must be proposed *coram iudice competenti ad causam principalem definiendam.*

2. It is the judge receiving the petition who has the function of judging his own competence (c. 1505 § 1), and his decree of admission may not be appealed (c. 1505 § 4). Therefore, the dilatory exception of relative non-competence means the challenge by the respondent of the decree admitting the petition, albeit limited to the statement made by the judge regarding his own competence. Given that this decision may not be appealed, it is logical that the same judge who admitted the exception should rule on it, so that, against what he already decided, he may rule again, taking into account the statements and evidence presented by the litigant who was not yet in the process when the admission of the petition was decreed. Therefore, the same judge will be allowed to rule on this specific issue, once the conflict has arisen, as a result of the citing of the respondent, and the instance has arisen, pursuant to c. 1517.

This way of challenging the competence accepted by the judge or tribunal adopts the generally accepted name: refusal of competence. In c. 1460, in connection with c. 1459, the refusal adopts the same procedure as for the dilatory exception. It essentially consists of a motion presented by a party other than the one who presented the petition, directed to the judge who admitted it, asking that he declare himself non-competent. It is this type of declinatory exception, owing to the relative non-competence of the judge who admitted the petition, that is referred to in c. 1460.

The fact of the validity of the procedural acts, which are derived from an admission of relative competence, cannot justify the judge's violation of the rules of competence when admitting the petition. The first duty of the judge is to submit to procedural law and apply it pursuant to the rules of a sound interpretation. Therefore, an erroneous ruling on his part, in the application of this procedural law, creates the right for the respondent to challenge this competence accepted in violation of law, and generates the public duty of the judge to retract his own decree, if the reasoned challenge of the interested party complies with the procedural form and time established for this type of challenge.

3. The order for proceeding as regulated in c. 1460, as if it were a unique system for challenging relative competence, suggests the issue of whether there is no challenge of competence designated by procedural doctrine with the term inhibitory. This challenge essentially consists of a formal motion before the judge who finds himself competent, but before whom the petition was not presented—which was admitted nonetheless by another judge who found himself competent—in order that the first judge uphold his competence over the petition and enjoin the inhibition for the one who must legally find himself incompetent, because he had been improperly hearing the petition presented before by the plaintiff.

The procedural means for inhibiting competence is the means that normally generates conflicts of competence. It is sufficient for the judge enjoined by inhibition to insist on his own competence that he already accepted. The possibility of a conflict of competence is foreseen in c. 1416,

as well as the attribution of competence once the conflict is created, so that the conflict be resolved (see commentary on c. 1416). Nonetheless, those conflicts will normally not arise through the exception, which is the situation referred to in c. 1460. Rather, these conflicts, even if they can be raised by one of the parties, will be directly presented not as an effect of the rights of parties before the judicial organs, but as confrontations between these organs, arising from conflicting judicial declarations of competence over the same objects of litigation. That will lead to the injunction of inhibition directed to the other organ that has been hearing, and resting mainly not only on whatever rule of competence to be applied to the case, but on the principle *non bis in idem*. Any occasion giving rise to these conflicts of competence can be found, for example, in the area of the connection of causes (c. 1414) or in the area of prevention (c. 1415).

But, that conflict of competence, which must be resolved by the appeals tribunal and, if there is no appeals tribunal common to the tribunals in conflict, the tribunal of the Apostolic Signature, is not always necessarily positive. As indicated by Del Amo and Calvo, these conflicts can also arise when those tribunals declare themselves non-competent and even when only one tribunal, with an objection by one of the parties, decides whether it can and should hear a matter.[1] This phenomenon of the negative conflict of competence can arise as a result of the exercise of the dilatory exception made through a refusal, which is why it is considered here.

The judicial law by which the judge or tribunal declares itself non-competent and decides to stop hearing the litigation that had been proceeding before him would certainly not indicate which judge or tribunal must be found competent. In fact, each judge rules on his own competence or whether he is non-competent in the case, but this still creates uncertainty for the plaintiff that needs the juridical system to offer solutions guaranteeing the right to take recourse. Therefore, these cases require the imposition of other mechanisms, ensuring proper functioning in the administration of justice in the Church. From this point of view, c. 1416 can fulfill a subsidiary function for proper order in canonical procedure, when, as an effect of the refusal, the interested party wishes to know with certainty before which tribunal or ecclesiastical judge his or her petition should be filed.

4. Paragraphs 2 and 3 of the canon refer to possible rulings offered by the exception of relative non-competence, in order to determine whether an appeal against these judicial rulings would be appropriate.

However, the canon says nothing about the procedure to be followed in its processing. The process to follow for dilatory exceptions is that of incidental matters. But, through the pronouncement of a judgment (c. 1589 § 1), after the proceedings of the oral contentious process (c. 1590

1. L. DEL AMO-J. CALVO, commentary on c. 1416, in *Pamplona Com.*

§ 1), provided that the effect of the decision resolving the exception has a certain definitive force (c. 1618), as can occur with those exceptions that, if sustained, end the case in chief (see commentary on c. 1459). On the other hand, for exceptions that are limited to a question of relative competence between judges or tribunals, all equally competent in principle, and with full validity of their acts even if the one who has been hearing the matter is later declared non-competent, it is sufficient to rule in the form of a decree, pursuant to c. 1590 § 2. These exceptions, which should be handled and decided *quam primum*, must be resolved after the judge, before whom the exception is presented, hears any of the parties appearing at the case in chief and offers them equal opportunities to present evidence, if either of them asks to propose and present evidence.

The declinatory exception of relative non-competence implies that the respondent has been cited and the instance has been initiated. There are the following possible resolutions:

a) Paragraph 1 foresees the situation in which the judge declares himself competent. In this case, the decision in favor of his competence contained in the decree admitting the petition is upheld (c. 1505 § 1). Like this first decree, it is not susceptible to recourse (*a contrario sensu* of what is provided by c. 1505 § 4). Likewise, his decree upholding or confirming his competence, which was already accepted in the previous decree, also may not be appealed.

However, § 2 provides that a plaint of nullity and full reinstatement against this decision is not prohibited. In this regard, the provision is explained with respect to the plaint of nullity, inasmuch as if the procedure had a defect of nullity, this defect, if it is also irremediable, cannot be remedied by an interlocutory resolution, because said potentiality is reserved, when certain requirements are met, for the judgment (c. 1619). This is a judgment that has acquired finality (c. 1641).

On the other hand, it is unclear why the reference to full reinstatement is included in this § 2 of the canon. This extraordinary recourse, reserved by c. 1645 § 1 for a judgment that has become an adjudged matter, could not be exercised on an issue such as a ruling on relative competence. The jurisprudence of the Rota has had occasion to find in favor of full reinstatement against interlocutory decisions rejecting *in limine litis* petitions for nullity of marriage. In these cases, there was still a certain effect of a definitive judgment when the possibilities of turning to the ecclesiastical tribunal, claiming due justice, were denied. However, the decision on relative competence is no further from this effectiveness. In this decision, there is an initial principle of lack of jurisdictional differentiation between the judges called to hear an object of litigation and between the judges among which there is a precise determination of spheres of competence for secondary reasons, and their performance never affects the validity of the acts when they did not have the relative competence to carry them out.

Canon 1610 § 2 of the *CIC*/1917 limited itself to denying that any appeal was allowed against these decisions in favor of relative competence. However, in the first *Schema* of the current Code, in c. 63 § 2, the phrase *at non prohibentur cetera iuris remedia* was added to the prohibition. It was at a session of the Consultors, dated May 18, 1978, when the drafted phrase was replaced by the current one: *at non prohibentur querela nullitatis et restitutio in integrum.* The reasons indicated by one Consultor, in objection, were formal reasons, because in practice the *ius ad appellandum* would have to be recognized if the other two recourses were accepted. In this regard, it was argued that this reason could not be admitted, because full reinstatement can only be requested for reasons determined in law.[2] However, nothing was said about situations that could occur with a judicial ruling on the determination of relative competence that would justify the proposition of full reinstatement.

b) Paragraph 3 of the canon refers to the situation in which the judge, facing a dilatory declinatory exception, declares himself non-competent. In this case, the party deemed to be prejudiced could appeal to the appeals tribunal within fifteen canonical days.

In this situation, a criterion is established that has already been established in c. 1505 § 4 for when the petition is rejected *in limine litis*, albeit with a shorter term for its proposition. One of the reasons for not admitting a petition may be that the judge before whom the petition is presented does not deem himself competent (c. 1505 § 2,1°), and from this point of view, there is an analogical relationship between both concepts, which allows the appeal.

In turn, there is another essential coincidence: the judge rejecting *in limine* a petition presented to him, due to relative non-competence, is with his decree, at the same time, denying the plaintiffs' ability to seek justice that they believe they have when formulating the judicial claim. Moreover, there will be a denial of that prayer for justice, if the petition is rejected for any other reason enumerated in c. 1505.

One might wonder if the same thing occurs when the judge, who has declared himself competent in his first decree, later revokes his decision when ruling in favor of relative non-competence. The question must be answered affirmatively, since the judge who declares himself non-competent in connection with a declinatory exception leaves the plaintiffs in the same situation they would have been in if the petition were rejected for any other reason. The judge, when declaring his relative non-competence, through the exception, does not indicate who the relatively competent judge is, but only refuses to hear the petition, which was presented to him and accepted, because subsequently, due to the dilatory exception, he

2. Cf. *Comm.* 2 (1978), p. 257.

came to recognize his error and rectifies it, now declaring himself incompetent. The process that has begun will not be able to proceed and, consequently, in prejudice to the plaintiff, there is a situation in which the justice requested is denied, in the same way as if the plaintiff's petition were rejected *in limine.*

Because of these similarities and analogies, the plaintiff, who is now denied the admission that had been decreed, would have been able to be granted the right to appeal through c. 1505 § 4. However, in faithfully following the recourse against rulings in incidental matters, the plaintiff is granted the right to appeal the non-competency ruling through c. 1460 § 3, which applies the common criterion of fifteen canonical days provided by c. 1630 § 1.

Therefore, in this specific recourse, the other norms common to appeals must be observed. But, because of the denial of the justice requested, inherent to the declaration of relative non-competence, in his handling of the matter, the judge must comply *mutatis mutandis* with the criterion set forth in c. 1505 § 3 for the appeal regulated therein: *quaestio autem reiectionis expeditissime definienda est.*

1461 Iudex in quovis stadio causae se absolute incompetentem agnoscens, suam incompetentiam declarare debet.

A judge who becomes aware at any stage of the case that he is absolutely non-competent is bound to declare his non-competence.

SOURCES: c. 1611; *PrM* 27 § 2

CROSS REFERENCES: cc. 124 § 1, 1406 § 2, 1430, 1433, 1452 § 2, 1459 § 1, 1460, 1505 §§ 1 et 2, 1587, 1618, 1620,1° et 3°, 1626, 1628, 1629,4°

COMMENTARY

Carmelo de Diego-Lora

1. This canon is located among the canons regulating exceptions. However, its formulation is as imperative as the formulation of c. 1611 of the *CIC*/1917, which was located among the canons on the office of the judges and tribunals. It is true that this latter chapter of the previous Code included norms on the exception of relative competence, as well as the norm offering a solution to disputes arising about competence among judges and tribunals (for this latter issue, see the commentary on c. 1460, which indicates the possibility of these conflicts arising between judges). This occurs when the respondent exercises the exception of relative competence and petitions the judge, who deems himself competent, to enjoin the judge who illegitimately accepted his competence when confronted with a petition over which he was not relatively competent. However, c. 1460 does not tackle this issue of the inhibitory exception, because it focuses on the exception of relative non-competence only from the point of view of the declinatory exception.

Both exceptions are considered as issues that have arisen as a consequence of the rights of the parties. Exercising the exception of non-competence always devolves upon these litigating parties, either through the dilatory exception in the case of a declinatory exception, or through the exception of the invocation addressed to the judge who finds himself competent, in the case of the inhibitory exception, to make the judge who accepted the petition stop hearing the case. The party presenting this type of claim must do so within the appropriate time for exercising the dilatory exception. Late propositions are not allowed for this type of challenge of competence, and the parties are subject to the most rigorous principle of procedural preclusion.

On the other hand, the primary recipient of c. 1461 is not the parties, even if the parties can also use the dilatory exception through the declinatory or inhibitory exception, to challenge competence improperly accepted by a judge who is absolutely non-competent. Canon 1461 is among the canons regulating exceptions, but it is directed towards the judge, in order that he acknowledge his absolute non-competence and so rule. Consequently, the fact that he must automatically stop hearing the petition improperly accepted by him is the reason he must send the proceedings already handled to the tribunal having absolute competence. However, this canon is directed not only toward the judge, but also toward any collegiate court that has admitted the petition and continued with the resulting proceedings without having noticed that it was absolutely non-competent.

2. The duty of the judge to automatically abandon the hearing he had been handling in the process, as well as the resulting referral of the proceedings to the judge or tribunal competent with absolute competence, even if it is not expressly set forth in the letter of the canon, is an imperative demand arising from the same canonical procedural system, supported by c. 1406 § 2 and by a fundamental sense of judicial economy, to avoid unjustified delays in the administration of justice in the Church.

This is not the place to comment on the meaning and scope of the concept of absolute competence or to show its origins or peculiarities with respect to what the *CIC* calls relative competence (see introduction to tit. I of part I *The Competent Forum*). But, it is necessary to point out that the consequence of absolute non-competence is always susceptible to irremediable nullity of any judgment that is pronounced (c. 1620,1°), just as a lack of jurisdiction in the supposed judge or tribunal that pronounced the judgment (c. 1620,2°). This nullity does not only affect the judgment, but also invalidates all procedural activity following the moment at which the judge accepted the petition (c. 1505 § 1), even though he is absolutely non-competent. It is not only the judgment pronounced by an absolutely non-competent judge that is null, as can occur with a judgment compelled by force or grave fear (c. 1620,3°), but rather all procedural acts ordered and handled under this absolutely non-competent judge are also null. This judge should have rejected *in limine litis* the petition presented to him because he is absolutely non-competent, because this duty of the judge, due to the force of c. 1461, exceeds the *potest tantum* authorizing him to reject the petition, expressed in c. 1505 § 2. Procedural acts are also subject to the constitutive requirements common to all juridical acts, pursuant to c. 124 § 1. It cannot even be said that the judge has any aptitude to judicially hear a petition for which he is absolutely non-competent, or that said procedural acts can meet the *sollemnia et requisita iure ad validitatem actus imposita* required by that canon.

Therefore, the judge must consider c. 1461, not only as situated in the area of the declinatory dilatory exception of non-competence

regulated in c. 1460—which he could also use ex officio pursuant to cc. 1452 § 2 and 1459 § 1—but also as belonging to the category of that judicial initiative authorized by c. 1626 § 2, as an initiative ex officio for the judge to correct his own mistakes, when he did not notice at the proper time the nullity that could affect his judgment. Given the radical and irremediable character of this nullity from absolute non-competence, the canon also contemplates it as an initiative to be exercised at any stage of the cause. The words of the canon (*in quovis stadio causae*) should be understood to include any grade of the cause being heard, and in any other type of recourse presented, in which case the duty established by the canon would devolve upon the higher tribunal deciding the recourse.

3. A decree declaring nullity, if it has not yet become a definitive judgment, can proceed from judicial initiative in two ways. The judge can interrupt *sua sponte*, on his own, the progress of the process, because the defect belongs to the procedural public order. The judge can also ex officio propose a timely incidental matter of nullity (c. 1587), through the exception, pursuant to cc. 1452 § 2 and 1459 § 1, if he believes the case warrants that the litigants be heard before the decree is issued.

In both situations, in that the public good is involved because procedural requirements and formalities are not complied with, the judge, before making a decision, must cite the promoter of justice (c. 1430), in order to avoid another resulting nullity phenomenon (c. 1433).

Any judicial decision made in favor of a declaration of absolute non-competence, regardless of its form, be it a decree or a judgment, is a decision having the force of a definitive judgment (c. 1618), because it ends the trial that has begun, at any instance at which it is pronounced. Therefore, it can be appealed by the party deemed to be prejudiced (cc. 1628 and 1629,4° *a contrario sensu*), which was expressly accepted in the canonical norms before the *CIC* (cf. *PrM* 21).

On the other hand, when that lack of absolute competence is claimed by one of the parties, this party will use a declinatory exception, pursuant to c. 1460. Even the plaintiff can propose it. This is because, due to that radical, irremediable nullity that has arisen with the plaintiff's petition, when directed towards an absolutely non-competent judge, at any stage in the proceedings, this party would be allowed to go against his or her own act, without needing to renounce the action already taken. For this purpose, the plaintiff will make the proviso of his or her desire to present the action before the competent judge or tribunal. That exception, presented on the initiative of a party, can be exercised at any stage or phase of the cause, because it is permitted by c. 1461.

In fact, since absolute non-competence is a cause for irremediable nullity of the judgment, the parties' right to file an exception, due to a lack of absolute competence in the judge who admitted the petition, is more in accordance with the provisions of c. 1459 § 1, as any other exception

arising from a defect that can cause nullity of the judgment, than with the demands of c. 1461, which is intended for the judge. It also allows the exception to be raised at any stage or grade of the process, even on judicial initiative. However, the *CIC* has chosen to stress in c. 1461 how to deal with absolute competence, certainly as a guarantee thereof, but also to stress that the ex officio initiative, in these cases, does not need an exception.

1462 **§ 1. Exceptiones rei iudicatae, transactionis et aliae peremptoriae quae dicuntur litis finitae, proponi et cognosci debent ante contestationem litis; qui serius eas opposuerit, non est reiciendus, sed condemnetur ad expensas, nisi probet se oppositionem malitiose non distulisse.**

§ 2. Aliae exceptiones peremptoriae proponantur in contestatione litis, et suo tempore tractandae sunt secundum regulas circa quaestiones incidentes.

§ 1. Exceptions to the effect that an issue has become an adjudged matter or has been agreed between the parties, and those other peremptory exceptions which are said to put an end to the suit, are to be proposed and examined before the joinder of the issue. Whoever raises them subsequently is not to be rejected, but will be ordered to pay the costs unless it can be shown that the objection was not maliciously delayed.

§ 2. Other peremptory exceptions are to be proposed in the joinder of the issue and treated at the appropriate time under the rules governing incidental questions.

SOURCES: § 1: c. 1629 § 1
§ 2: c. 1629 § 2

CROSS REFERENCES: cc. 1459–1461, 1513, 1514, 1541, 1585, 1587, 1607, 1611, 1642 § 2, 1649,1°, 2°, 4° et 5°, 1660, 1716 § 1

COMMENTARY

Carmelo de Diego-Lora

1. Dilatory exceptions are regulated, with respect to the order for proceeding, in cc. 1459–1461, for which, in principle, they are subject to procedural preclusion by having to be presented before the answer to the petition. On the other hand, the exception of absolute competence, as well as exceptions by which defects are alleged that could affect the nullity of the judgment, can be proposed at any phase or grade of the process.

The *CIC* discusses exceptions by which opposition to the petition is supported with facts that the respondent deems to have in his or her favor, which impede, exclude or extinguish the rights asserted by the plaintiff. These are called peremptory exceptions, and they do not exhaust the

possible defenses of the respondent, which can range from a denial of the facts in the petition to a juridical contradiction, based on an interpretation contrary to the juridical bases in the petition. This can either be due to an improper application to the case, a mistaken understanding of the letter or meaning of the laws cited, an argument regarding their validity, or because the attempt to subject the case to the alleged factual situation is inadequate. This includes objections or opposing arguments that may result from the evidence presented by the plaintiff or that are already incorporated into the petition, if they are documents or are expressed through documents.

In any event, peremptory exceptions are integrated into the same main issue discussed in the case, on which the definitive judgment, pronounced in the case in chief (c. 1607), must be pronounced for the judgment to achieve its best congruence (c. 1611).

2. Due to the foregoing, it is not surprising that § 2 of c. 1462 provides that all those peremptory exceptions not included in § 1 are proposed in the same answer to the petition. In this regard, by stating that these exceptions must be proposed *in contestatione litis*, the *CIC* has considerably improved on c. 1628 § 2 of the *CIC*/1917, which stated that they must be proposed *post contestatam litem*. This change deserves praise, since peremptory exceptions, together with other defenses, constitute the essential nucleus of the procedural hearing, with which elements the formulation of the issue, in which the terms of the controversy are defined (c. 1514), is constructed by the judge (c. 1513). This is true to such an extent that the oral contentious process highlights the relevance of exceptions in the structure of the object of the controversy. Canon 1660 provides that the judge must indicate, if the exceptions proposed by the respondent require it, the term the plaintiff has for responding to them. In this way, the judge can make a precise determination of the object of the process, taking into account the statements of both parties.

3. The remainder of the text of § 2 of the canon is the same in both codes: the phrase *et suo tempore tractandae sunt secundum regulas circa quaestiones incidentes.*

Dilatory exceptions, which are usually procedural, must be handled in accordance with the canons on incidental matters, because this is permitted by c. 1587 (see commentary on c. 1459). In these cases, they are issues that arise after the citation that were not expressly included in the petition. These issues normally need to be resolved before the case in chief. This does not normally occur with peremptory exceptions, which, together with the statements of the plaintiff in the petition, come to be incorporated into the process hearing to the point that they must be resolved in the judgment of the case in chief.

For this reason, the second paragraph of c. 1462 § 2, which was taken from its immediate precedent, c. 1629 § 2 of the *CIC*/1917, seems

odd. Commentary writers do not usually explain this provision with concrete examples. However, they usually refer to the peremptory exceptions of c. 1459 § 2, and even cite non-competence exceptions. This could lead one to conclude that the last clause of § 2 is repeating those peremptory exceptions other than those of § 1, which in the *CIC*/1917 were handled as dilatory exceptions, such as the exception of a contract not complied with or the exceptions subject to a term for their exercise but exercised before the established time. These rare cases do not justify retaining the norm, especially when it is expressed in such general terms that it seems applicable to any peremptory challenges not in § 1. Moreover, they do not refer to these latter exceptions, because they are peremptory with dilatory procedures, in which case the incidental matter would be justified, because § 1 only refers to exceptions that are mentioned therein.

For these reasons, the last part of § 2 of c. 1462 could have been eliminated. Alternatively, it would have been more appropriate to place the latter part of § 2 at the end of § 1, or include it in c. 1459. This is because in these cases, with dilatory exceptions, or with peremptory exceptions proposed as dilatory exceptions, actual incidental matters arise that find no occasion to be created by peremptory exceptions, normally accommodated in the main controversy of the object of litigation, on which the definitive judgment must be pronounced to resolve all its components.

4. The first section of c. 1462 is an exact repetition of c. 1629 § 1 of the *CIC*/1917. Nevertheless, there is a difference between them at the beginning of the list of the exceptions mentioned, although both canons maintain the same idea that is the existence of some peremptory exceptions, such as that of the adjudged matter, the transaction, and other peremptory exceptions that are included under the terms of the exception of *litis finitae* or *pleito acabado* [suit ended], as it is usually translated in Spain. One could also include others exceptions not expressly mentioned, such as the award or decision of arbiters and the waiver of action by a person who later attempts to exercise it in the petition.

These exceptions are peremptory exceptions, because facts are set forth that exclude the action exercised in a chronologically subsequent libellus of the lawsuit. Those facts are binding juridical acts, originating from new juridical effects, distinct from those that the plaintiff will seek to obtain through the presentation of his or her petition. At times, even some exterminating facts could be included, such as the express and valid forgiveness of a debt by the legitimate creditor. These phenomena, although they would normally operate through the peremptory exception, could function through the procedure for the dilatory exception, provided the juridical acts have public confirmation, usually documents, verifying with some authenticity the excluding or extinguishing fact.

A priori accreditation of these facts that generate new juridical effects, which exclude or contain the action of the respondent, is what justifies these peremptory exceptions being favored with the treatment for

dilatory exceptions. This is an attempt to avoid future proceedings that would not only be costly, but also useless when there had previously been juridical acts creating new effects distinct from the previous ones, which they came to replace. If those facts had not occurred, the petition presented could have been well founded. If the proof of said facts should encounter greater difficulties, because they are peremptory exceptions, the incidental matter creating the dilatory exception would not be justified. This is because the appropriate accreditation would have to be presented in the evidentiary period of the case in chief for the definitive judgment to decide on said exceptions and evidence supporting it or, on the contrary, challenging it.

Together with the description of peremptory exceptions that may be exercised as dilatory exceptions, § 1 of the canon includes them under the common classification of exceptions *litis finitae.* This suggests that the canon is starting from the assumption that some juridical acts that exclude or extinguish the action of the plaintiff that is later exercised in his or her petition, but these acts have had a certain procedural verification because they have occurred—as the adjudged matter or the judicial transaction—in the heart of a process prior to the one that ended the judgment or judicial decision that recognized the transaction performed by the parties in the presence of the judge.

However, another type of facts can create an exclusion or termination of the action that the plaintiff later wants to exercise in his or her petition. They consist of juridical acts which, taking place outside the sphere of the process, were transferred through the documentary verification of the juridical act, to a process that was terminated through this verification. That is what justifies the fact that all those peremptory exceptions can be called of 'suit ended', and not that this exception of *litis finita* is contemplating a special type of peremptory exception, as opposed to the adjudged matter exception, with the former reserved for final judgments in causes on the status of persons, which never become an adjudged matter.

On the other hand, final judgments pronounced in causes on the status of persons have the effects of an adjudged matter (see introduction to tit. IX, section I, part II, book VII and the commentary on c. 1643)[1] and the exception *litis finitae* is a generic denomination for all those juridical acts, be they procedural by their nature or by their subsequent incorporation into the process, which come to end this process, because the pending object of the litigation has already been directly or indirectly decided, which prevents a subsequent presentation among the parties of claims that were resolved. For this purpose, the exception *litis finitae* includes various juridical phenomena, all agreeing that those actions have been excluded from future exercise or extinguished. In this way, it is possible to

1. To the contrary, cf. L. DEL AMO, "La excepción de pleito acabado y la revisión de causa," in *Ius Canonicum* 6 (1966), pp. 401–506.

avoid late propositions of actions between the same subjects on the same object and cause of action, because the prior juridical situations were finished or substantially changed or modified because of those juridical acts that have procedural efficacy because of the exception.

Moreover, that public verification can strengthen those juridical acts—which serve as facts excluding or extinguishing the actions pending exercise—in such a way with respect to their veracity or accuracy for it to be sufficient for them to be exhibited before the competent authority, in order that this authority, provided the contrary is not proven, hold the juridical act to be certain and true (c. 1541).

In this way, by extension, the peremptory exception, based on this type of documents, could be alleged with the effect of a *litis finita*, because this document would confirm that the former differences existing between the parties, which later carried out the issuance of the document, had disappeared, to make way for a new juridical situation terminating that dispute, regardless of whether the situation in dispute was resolved through judicial means. This would mean that the juridical act, formalized through its public verification, would end the prior conflict situation—*litis finita*, suit ended.

Thus, by analogy, terminology is used in this interpretation that is procedural by nature and is extended to the field of juridical-material relationships. In these relationships, through acts that are dispositive of an intention, certain new juridical phenomena are generated that, by being alleged as a peremptory exception, would function with an effectiveness such as to allow, given the documentary evidence in which the intentions have been expressed, their exercise through the dilatory exception, even if it were peremptory by nature. This can occur with a transaction contract that, even if not judicial, has been put in the form of a public, notarized document by the parties. For the decision of the arbiters to acquire efficacy, not all juridical systems require that it be submitted for judicial approval, as seen in c. 1716 § 1.

5. The exceptions referred to in § 1 of the canon are described as mixed exceptions, because, possessing by nature the peremptory quality, they nonetheless procedurally receive a juridical treatment in common with dilatory exceptions. This is what c. 1462 § 2 is doing when it provides *proponi et cognosci debent ante contestationem litis.*

Moreover, the canonical norm, in spite of such expressions with regard to the initiative of its proposition, cannot fail to recognize their peremptory nature, and as such authorizes their being lodged later, in which case, as with other peremptory exceptions, they must be presented in the same answer to the petition, as provided in c. 1462 § 2.

Previously we noted our surprise concerning the last clause of this § 2 of the canon, when it provides that peremptory exceptions *suo tempore tractandae sunt secundum regulas circa quaestiones incidentes.*

We then indicated, in criticizing this phrase, that the appropriate point in the proceedings for handling peremptory exceptions was extended to the entire process, since given that the exceptions are based on facts, these facts should be proven, especially in the evidentiary period, and then they would be subject to the order regarding the publication of the evidence, to the discussion at the time of the final pleadings, and to the answers that must be pronounced in the definitive judgment, because the effects of these facts, claimed as an exception, must be incorporated into the formulation of the issue. However, in the case of mixed exceptions, their proposition as purely peremptory, not as dilatory, can be justified by the fact that the judge is allowed to order, by suspending the proceedings of the case in chief, that this type of peremptory exceptions filed late be handled and decided, as an incidental matter, pursuant to the provision made at the end of § 2.

The type of evidence that usually accompanies the filing of mixed exceptions makes it reasonable to make way—at the request of a party, and even ex officio—for the incidental matter, to avoid the costs and delays resulting from a full handling of the case in chief. In fact, a detailed dispute on the specific object of the process presented to the judge, on the occasion of the mixed exception, can resolve the case in chief through the judicial decision on the incidental matter, with the judicial economy resulting from preventing the case in chief from taking its course.

6. Paragraph 1 of the canon clearly states that, in principle, they are peremptory exceptions that must be handled as dilatory exceptions. Therefore, without denying or preventing them from being lodged as purely peremptory exceptions, it adds to its authorization the threat of ordering any person who maliciously acts to pay expenses incurred because the exception was not presented as a dilatory exception. In the Spanish translation, the word "expensas" of § 1 of the canon has been translated as "costas" [costs]. However, if judicial costs are understood only as those incurred because of the expenses resulting from the judicial activities (c. 1649,1°), the translation is inappropriate. Judicial expenses "in a broad sense, cover the expenses of the trial including all costs, as well as the payment of damages."[2] Thus, the term *expenses* includes all the financial items enumerated in c. 1649,1°, 2°, 4° and 5°.

With this sanction provision of § 1 of c. 1462, there is an attempt to financially punish any malicious attempt on the part of the respondent to reserve the exercise of a peremptory exception that he or she could have proposed at the appropriate time as a dilatory exception. By not doing it in this way, this conduct by the respondent would bring consequences of greater financial damage for the plaintiff, not to mention exposing the judicial organs to the performance of an activity with unnecessary attention

2. L. DEL AMO–J. CALVO, commentary on 1464, in *Pamplona Com.*

and time, which would definitely harm the proper administration of justice in the Church. Therefore, even if the peremptory exception filed late is sustained, the respondent who proposed it must bear the costs incurred in the process, including not only strictly judicial costs, but also professional fees and compensation of witnesses acting in the process, including those who did so on the initiative of either party or the judge, as well as other expenses incurred in the process because of an imprudent litigant.

When there is no recklessness on the part of the litigant delaying the presentation of the exception, that financial order must not be imposed by the judge or tribunal. Recklessness on the part of the litigant is analogous to acting with malice in the process, intentionally using legitimate procedural means, but in violation of their sense and objectives, a subspecies of legal fraud. With even more justification, this order to pay costs is appropriate if the means used by the party are illegitimate, always prejudicing the interests of the other party and disregarding the respect and consideration deserved by the tribunals of justice in the Church.

On the other hand, when malice is lacking in the untimely proposition of these mixed exceptions, the last clause of § 1 of the canon establishes that the economic sanction will not be imposed when the respondent proves to not be delaying the filing with malice: *nisi probet se oppositionem malitiose non distulisse*. This text establishes a presumption *iuris tantum*, which allows evidence to the contrary (c. 1585), regarding malice on the part of the opposing party. Therefore, the respondent who is late in alleging an exception not only will have to face the burden of proving the facts on which the exception is based, but, if the respondent wishes to be released from the economic sanction, will also have to prove that the late procedural action was in good faith.

7. Not all classic peremptory exceptions from which no effect results if they are not expressly proposed by the party having the right to file an exception are peremptory exceptions. In fact, c. 1642 § 2 presents the adjudged matter exception, as a consequence of an innovation of what was not in the parallel c. 1904 of the *CIC*/1917, with the legal consideration of improper exception. Therefore, without the need for a claim by a party, the judge must declare it ex officio, to prevent the cause that was resolved with finality from being reintroduced judicially. With respect to the adjudged matter, as stated in c. 1642 § 2, it is law for the parties, and the first party bound thereby is the judge who has an occasion to put it into effect.

1463 **§ 1. Actiones reconventionales proponi valide nequeunt, nisi intra triginta dies a lite contestata.**

§ 2. Eaedem autem cognoscantur simul cum conventionali actione, hoc est pari gradu cum ea, nisi eas separatim cognoscere necessarium sit aut iudex id opportunius existimaverit.

§ 1. Counteractions can be proposed validly only within thirty days of the joinder of the issue.

§ 2. Such counteractions are to be dealt with at the same grade of trial and simultaneously with the principal action, unless it is necessary to deal with them separately or the judge considers this procedure more opportune.

SOURCES: § 1: c. 1630 § 1
§ 2: c. 1630 § 2

CROSS REFERENCES: cc. 201 § 1, 202 § 1, 203 § 1, 1465 § 1, 1494–1495, 1507–1508, 1513, 1516, 1589, 1590, 1593 § 1, 1597, 1611,1°, 1660, 1683

COMMENTARY

Carmelo de Diego-Lora

1. The requirements that must be met for a counteraction to be admitted by the judge and its limits are found in cc. 1494 and 1495. The content of these canons is a necessary precedent for an understanding of c. 1463, because c. 1463 only regulates some procedural aspects of the counteraction. However, the *CIC* separates the canonical norms treating counteractions, anticipating in the chapter *De ordine cognitionum* a later treatment of the matter.

2. Canon 1463 § 1 is a provision on the moment in the process when the respondent may assert a counterclaim against the party who has the role of the plaintiff in the process. The canon seeks to limit the possibilities for filing a counterclaim by allowing it to be proposed only within thirty days from the joinder of issue.

The precedent of this canon is c. 1630 § 1 *CIC*/1917. This canon allowed a counteraction to be filed at any time in the trial before the judgment, although there was still an obvious intent that was better to present it immediately after the joinder of issue. Canon 66 § 1 of the *schema* of the

current *CIC*[1] literally reproduced c. 1630 § 1. Nevertheless, it received the unanimous agreement of everyone, because they felt that counteractions often require at least a supplementary instruction, which could be proposed not before the judgment, but *ante conclussionem in causa*. When the amendment to c. 66 § 1 of the *schema* was proposed, the proposal considered by the consultors was that the counteraction could only be presented immediately after the joinder of issue, or at least before the conclusion *in causa*. This second point was the one accepted, not the first. Yet, in the final wording of the canon, a time limit (c. 1465 § 1) of thirty days has been established, to be calculated from the joinder of issue, the day *a quo* of which should not be counted (c. 203 § 1). The time of this term is continuous (c. 201 § 1), and days should be understood as 24-hour periods beginning at midnight (c. 202 § 1).

Since the thirty-day term is a time limit, it could not be validly extended or shortened, if not at the request of the parties (c. 1465 § 1). However, the term of c. 1463 § 1 is worded with a stricter requirement, which makes no concession, not even at the request of the interested parties. It is an imperative norm—*ius cogens*—required by proper procedural order, which would be violated if not obeyed. The judge and the interested party must submit, without exception, to the rule resulting from the concise order contained in the letter of the law.

However, the term of thirty days from the joinder of issue seems excessive. The counteraction avoids a new process brought about by the respondent, using in the exercise of his or her action, the same process by which the respondent was cited as a consequence of the plaintiff's petition. For this reason, any initiative that could obstruct or prolong a process, either to offer new opportunities for defenses and exceptions, or subsequent opportunities to propose and receive new evidence, upsets the proper pace of the process towards conclusion. In fact, as stated in c. 1463 § 2, the action of the plaintiff in the petition and that of the respondent in the counteraction, must be heard *pari gradu*, which translated in the original Spanish version, is *al mismo ritmo* [simultaneously]. This cannot take place if the counteraction is filed at the end of the thirty days from the joinder of issue, which may be in the middle of the instruction period.

It should also be taken into account that this norm cannot be applied to the oral contentious process, which lacks a specific canon in this regard. For this process, c. 1660 is the only norm that could be applied by analogy and extension for the counteraction. Canon 1660 was established for the situation in which the respondent presents exceptions on which the judge deems it appropriate to hear the plaintiff, in order for the judge to obtain a better perspective for properly formulating the issues.

1. Cf. *Comm.* 10 (1978), pp. 258–259.

3. Canon 1463 § 2 illustrates the effect of a counteraction on the process. Instead of describing procedural rules to follow, the canon chooses a somewhat abstract formula. A counteraction must be heard *simul cum conventionali actione, hoc est pari gradu cum ea*. Thus, the canon sets forth a rule of simultaneity of procedural treatment: just one judge, just one process, just one procedural progression.

This makes it clear that the counteraction is only allowed in first instance. The possibilities of presenting new actions for nullity of marriage have their own rules, implied in c. 1683. Canon 1463, § 2 governs ordinary processes. Moreover, this canon has some implicit meanings that the provision takes for granted that juridical officials will put into practice, as appropriate:

a) the possibility of admission or rejection of the counteraction by the judge, as in every situation in which actions in the form of a petition are exercised (c. 1505);

b) the need, if the counterclaim is admitted, to stop the proceedings that are in process to notify the plaintiff, in order to give the plaintiff an opportunity to respond, if appropriate, to the petition (cc. 1507 and 1508);

c) a new setting of the limits of the dispute through the decree of the formulation of the issue, either completing the previous one formulated, with only the petition and the answer, or taking what resulted from the petition, the counteraction, and their respective joinder, in a decree pronounced for the first time after the counteraction is presented and answered (c. 1513);

d) if, by the time the counteraction is presented, the instruction of the cause has begun (c. 1516), this evidentiary period must be interrupted for the counteraction, the necessary subsequent proceedings and the formulation of the issue to influence this period, to make way for a new term for the proposition and presentation of evidence, which should be extended by the judge to avoid putting the respondent filing the counteraction at a disadvantage with respect to the plaintiff, who could be in a favorable situation with respect to the time set aside for the evidence that the plaintiff had prior to the requests in the petition; and

e) in the rare situation in which the counteraction is presented later (albeit always within thirty days), to maintain the principle of equality of procedural options for the parties, it would be necessary to apply by analogy the criteria resulting from the provisions of c. 1593 § 1, in favor of the respondent whose appearance in the process came late. In this situation, the canon gives rules that attempt to reconcile the guarantees, rights, and defenses of the parties with respect to allegations and evidence, with the judge's duty to avoid long and unnecessary delays in the process.

4. Lastly, c. 1463 § 2 provides that, if he deems it appropriate or necessary, the judge may order that a counteraction be heard and decided, not simultaneously with the action of the plaintiff, but separately. The

determination of these factors—need or appropriateness—depends on the judge or the tribunal. Many reasons could justify the separation of the procedural treatment of the principal action and the counteraction, such as when the judge notes that the counteraction appears to be an attempt to delay the process unduly.

However, at the same time, the very idea of a counteraction implies a unitary and simultaneous treatment of the action of the actor with respect to the respondent and the respondent's action with respect to the plaintiff. The judge or tribunal accepting the filing of the counteraction is committing to submit these new actions to that unitary procedural treatment. By accepting the counteraction, the judge or tribunal is recognizing the right of the respondent to have this action treated at the same time as the action of the plaintiff. Because of this admission, procedural rights for the parties are created, which the judge can no longer provide at his discretion, since he is subject to all the consequences derived from the initiation of the instance (c. 1517). Thus, the judge must hear and rule, making a formal pronouncement, responding to all the issues formulated, as expressed in the respective decree. This decree, if not challenged at the appropriate time in the proceedings (c. 1513), is binding on the judge, who must respond in the judgment to all the formulated issues (c. 1611,1°).

By contrast, separate procedural handling of the actions is contrary to the idea of the counteraction. To accept the counteraction presented, in order that it not have to be presented later, at the sole discretion of the judge, goes against the very concept of the counteraction. It seems preferable for judicial discretion to be authorized for the judge before the admission of the counteraction, with his decision, intended for the future, avoiding any difficulties that could be foreseen with the admission of the counteraction. Just as c. 1589 § 1 foresees the power to reject the incidental petition because of certain difficulties in its admission, a similar faculty could have been granted for when the counteraction is exercised, shifting it, from the start, to another different point in the process. On the other hand, admitting the counteraction in order to give each action a separate procedural treatment, at the sole discretion of the judge who admitted it, seems contrary to judicial consistency. If there are separate processes, it is unreasonable to continue to use the term "counteraction."

1464 Quaestiones de cautione pro expensis iudicialibus praestanda aut de concessione gratuiti patrocinii, quod statim ab initio postulatum fuerit, et aliae huiusmodi regulariter videndae sunt ante litis contestationem.

Questions concerning the guarantee of judicial expenses or the grant of free legal aid that has been requested from the very beginning of the process, and other similar matters, are normally to be settled before the joinder of the issue.

SOURCES: c. 1631

CROSS-REFERENCES: cc. 1452, 1496–1499, 1504, 1505 §§ 1,2, et 4, 1513, 1517, 1571, 1580, 1587–1591, 1611,1°, 1649, 1659, 1660, 1661 § 1.

COMMENTARY

Carmelo de Diego-Lora

1. The canon uses the exact wording of c. 1631 of the *CIC*/1917. It refers to guarantees for ensuring the payment of judicial expenses, for the grant of free legal aid, and other similar matters that deserve to be established in advance. Since this canon is in the chapter entitled *De ordine cognitionum,* these guarantees are contemplated from the point of view of their order in the proceedings. Therefore, the canon provides that these matters should usually (*regulariter*) be handled—the resolution should also be understood as included—before the joinder of issue.

While the canon does not provide a procedure to follow for the furnishing of guarantees when they are proposed by one of the parties at the beginning of the process, for Roberti, this type of guarantee is included among procedural dilatory exceptions.[1] Moreover, this type of dilatory exception, with respect to its filing, processing, and resolution, shall be subject (see commentary on c. 1459) to the provisions for incidental matters (cc. 1587–1591). If these matters are proposed later, they will be resolved as incidental matters:[2] "The canon says *regulariter,* because these incidents arise not infrequently during or at the end of the trial, and *it* is right

1. F. ROBERTI, *De processibus*, I, (Vatican City 1956), pp. 444–445.
2. Cf. M.J. ARROBA CONDE, *Diritto processuale canonico* (Rome 1993), p. 266.

in such cases that they be settled as they arise, for instance, the question of legally established poverty or the appointment of an advocate."[3]

If the plaintiff proposes the matter, he will do so in his libellus of the lawsuit, as an incidental petition of the *quid petatur* of the case in chief (c. 1504,1°). If the matter is presented by the respondent before, or in the answer to, the petition, it must be resolved before the joinder of issue, which is produced by the judicial formulation of the issue (c. 1513). If the issue is presented by the respondent when answering the petition in writing in the oral contentious process (cc. 1659 and 1660), or even before answering, the judge must resolve the matter before formulation of the issue (c. 1661 § 1, first subparagraph).

The judge may proceed to establish this type of guarantee ex officio before the *litis contestatio*. In that they are guarantees that tend to ensure that certain future effects occur that would benefit justice in the Church, c. 1452 contains sufficient information to support the possibility of this initiative even if the instance has not been initiated (c. 1517).

When the judge proceeds to the admission of the petition, he must make any decision involving guarantees for due and orderly judicial proceedings, such as ordering guarantees before the joinder of issue, as provided in c. 1464. However, if a party challenges this precautionary order, the judge or presiding judge of the tribunal will admit this challenge, handling it in a timely manner as an incidental matter. On the other hand, the appeal recourse of c. 1505 § 4 will not lie, because this recourse is specific for the decree rejecting the admission of the petition.

2. Another problem is the question of the nature of these guarantees. The *CIC*, when discussing actions and exceptions in particular, regulates precautionary measures in cc. 1496–1499: sequestration, restraint on the exercise of a right, and seizure. These actions, if exercised in the libellus of the lawsuit of the case in chief, acquire the characteristic of being incidental to the case in chief. Moreover, the judge may agree, within the time contemplated in c. 1464, to the litigants' request, without prejudice to their being presented separately, or later, once the cause in chief is in progress. In any event, what the party seeking the grant of a guarantee must prove, according to the case, is that the party meet the respective conditions of cc. 1496 and 1497 § 1. Nevertheless, c. 1498 establishes that this guarantee will not be granted if the damage feared may be repaired in another way, and if a guarantee for its reparation is offered. Moreover, pursuant to c. 1499, the judge or presiding judge of the tribunal may demand from the party requesting sequestration or the restraint on a right an advance guarantee for the reparation of damages if it turns out the party cannot prove to have the right claimed.

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3. L. DEL AMO–J. CALVO, commentary on c. 1464, in *Pamplona Com.*

These provisions of the canons related to precautionary actions and exceptions, especially *the subsidiarity of the guarantee* and that of *guaranteeing reparation for damages,* must be borne in mind by the judge or the presiding judge of the tribunal when deciding on the guarantee of payment of judicial or other similar expenses, following the provision of c. 1464.

"*Judicial expenses,* in a broad sense, cover the expenses of the trial including all costs, as well as payment of damages (c. 1649)."[4] The subject of judicial costs, as well as what refers to free legal aid, has been moved from the *CIC,* to refer to some norms pronounced by the bishop for these purposes, which also includes payment of damages (c. 1649, see commentary). Moreover, c. 1571 refers to compensation of witnesses for expenses incurred as lost income because of their appearance before the judge to give testimony. Likewise, c. 1580 refers to particular law concerning payment of experts' expenses and fees. On the other hand, the subjects were thoroughly dealt with in cc. 1980–1916 of the *CIC*/1917 and in Articles 232–240 of *PrM.*

Today, special stress is placed on the cost-free administration of justice in the Church, although, because court activities normally generate expenses, the issue of judicial expenses cannot be completely ignored. Nonetheless, the regulation of these issues is left to each local church, since the economic consequences of judicial activity can vary substantially. However, c. 1611,4° maintains the general provision that the judgment must determine the costs of litigation, and c. 1464 maintains the legitimacy of establishing guarantees to ensure payment of those costs.

The guarantee must be established at the discretion of the judge, to forestall any risks resulting from reckless or irresponsible litigious conduct, but at the same time seek to prevent the guarantee from being so costly that it prevents the assertion of rights, which *de visu* demonstrate a certain seriousness in their justification, from receiving *a priori* due protection. In these cases, the judge, in setting the guarantee, shall assess the difficulties posed by the proposed object of the litigation, foreseeable evidence to be presented, and potential damage that can be incurred if the request made by the party in the case in chief is not agreed to. If there is morally certain hope that the damage may be compensated in any event, this guarantee should be avoided, and for this purpose other guarantees are offered (c. 1498).

3. Not all the guarantees of c. 1464 are measures to anticipate future events from which expenses and responsibilities may arise which cannot be economically met, or damages or other economic prejudices may arise which it is feared may not be compensated because of the insolvency of those who caused them. In fact, the guarantee called *de concessione*

4. L. DEL AMO–J. CALVO, commentary on c. 1464, in *Pamplona Com.*

gratuiti patrocinii is not a precautionary measure, but a measure by which, after a request by the party interested in receiving legal aid, this party enjoys privileged economic treatment in the process. In this way, the party is fully or partially relieved of the economic burdens (c. 1649,3°). If this benefit is granted, this justice free of cost takes effect for the party, and in this way it is possible to prevent justice from being withheld from those who lack the financial means for meeting the respective costs. Therefore, it is not a guarantee, but an aid from the legal system for those with limited financial resources, so justice may be administered equally to all the faithful.

Before free aid is granted, usually there will be a procedure by which the judge verifies the litigant's limited financial resources. If this request, incidental to the case in chief, is presented by the plaintiff to be decided before the joinder of issue, the procedure for verifying the need for free legal aid shall take place outside of the adversarial action. However, if the other party challenges it after it is granted, this challenge will follow the procedure for incidental matters. In addition, in principle, the procedure for incidental matters will be followed if the request is made once the process is in progress and the instance has been initiated.

However, there must be the necessary proviso in favor of particular norms promulgated by the bishop concerning free legal aid (c. 1649,3°). From this point of view, the provisions of Articles 115–119 of the *Normas* of the Tribunal of the Roman Rota,[5] which also regulate the granting of this benefit, classified, under the heading of chap. VII in its title III, *De gratuito patrocinio*, can serve as guidance. Although classified as an "incidental matter" in Art. 119, intended for the appeal of the decree of the judge writing the opinion, these provisions do not refer to the chapter on incidental matters (Articles 75–78), but some particular norms for their handling, ruling, and appeal are provided.

Regarding its presentation as a preliminary measure, one only need highlight art. 117 § 2, which provides that this procedure is not admissible in the Rota, when the tribunal *a quo*, in sending the acts of the cause, certifies that the party had obtained an exemption from costs and free legal aid in the previous trial. However, it states that whoever enjoys the benefit must prove, in the litigation in question, that he or she enjoys a presumed legitimate right (Art. 116 § 2).

5. Cf. *AAS* 86 (1994), pp. 508–540.

CAPUT III
De terminis et dilationibus

CHAPTER III
Time Limits and Postponements

1465 **§ 1. Fatalia legis quae dicuntur, id est termini perimendis iuribus lege constituti, prorogari non possunt, neque valide, nisi petentibus partibus, coarctari.**

§ 2. Termini autem iudiciales et conventionales, ante eorum lapsum, poterunt, iusta intercedente causa, a iudice, auditis vel petentibus partibus, prorogari, numquam autem, nisi partibus consentientibus, valide coarctari.

§ 3. Caveat tamen iudex ne nimis diuturna lis fiat ex prorogatione.

§ 1. The so-called *fatalia legis*, that is time limits set by law for the extinguishing of rights, cannot be extended, nor can they validly be shortened except at the request of the parties.

§ 2. After hearing the parties, or at their request, the judge can, for a just reason, extend before they expire times fixed by himself or agreed by the parties. These times can never validly be shortened without the consent of the parties.

§ 3. The judge is to ensure that litigation is not unduly prolonged due to postponement.

SOURCES: § 1: c. 1634 § 1
§ 2: c. 1634 § 2
§ 3: c. 1634 § 3

CROSS REFERENCES: cc. 18, 1453, 1514, 1630, 1633, 1635

COMMENTARY

Miguel Ángel Ortiz

This brief chapter discusses the time requirements for performing procedural acts. *Requirements* regarding place, time, or manner are circumstances that are coeval with the act, while *presuppositions* are prior and *conditions* are subsequent.[1] This chapter concerns the availability enjoyed by the parties and the judge concerning the moment at which the procedural acts take place. The norms of this chapter are completed with those on the calculation of time: cc. 200–203.

The *times* referred to in c. 1465 are periods established for the performance of a procedural act. They are units of days during which the act can be performed. On the other hand, the *term* (although occasionally also used to refer to the times) indicates the specific moment in time in which an act must be performed. On occasions, *term* is understood less precisely as the final moment of the delay.

The Spanish translation of the Latin *De terminis et dilationibus* can cause confusion. In fact, *time* evokes more a lapse of time (similar to *delay*) than a specific moment (the Latin *terminus*), while *postponement* connotes the lengthening of an established time. In general, the period, which is susceptible to being lengthened or shortened, determines when the final term thereof can vary. The proceedings must take place *within* the times or postponements provided by law (or at the exact time, e.g. the appearance). Once the time or term has lapsed, the acts can no longer take place, unless a postponement is granted. On the other hand, rights *expire*, as stated in c. 1465.

Delays are distinguished according to their origin, their stability, and their effect. According to their origin, the law, the judge, or the parties can establish times. As for stability, they can be prorogable or non-prorogable. As for the effect, it may be peremptory or simple[2] (these latter effects also are referred to as *dilatory*).[3] Following the *CIC*/1917, delays have also been distinguished as a function of the connection with the parties in the process or with the objective sought: summons, deliberation, and challenge, evidence and arguments, definition, execution, and appeal.[4]

Improper times are those that the law establishes for the tribunal to perform any act within a reasonable period. For example, the law notes

1. Cf. A. DE LA OLIVA-M.A. FERNÁNDEZ, *Derecho procesal civil*, II (Madrid 1990), p. 114.
2. Cf. L. DEL AMO, commentary on the chapter "De los plazos y prórrogas," in *Pamplona Com.*
3. Cf. F.X. WERNZ-P. VIDAL, *Ius Canonicum, VI (De processibus)* (Rome 1949), p. 161; E. FERNÁNDEZ REGATILLO, *Institutiones Iuris Canonici*, II (Santander 1951), p. 255.
4. Cf. F.X. WERNZ-P. VIDAL, *Ius Canonicum*, cit., p. 161; F. ROBERTI, *De processibus*, I (Rome 1956), pp. 449ff and 454ff; M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica iuxta Codicem Iuris Canonici*, I (Rome 1950), p. 265.

that the tribunal must complete the cause in no longer than one year at the first instance and six months at the second (c. 1453). These terms stimulate the activity of the tribunal with a juridical mandate, and their disregard can give rise to disciplinary sanctions (cf. c. 1457).[5] These times manifest the legislator's desire that trials not be excessively long, a desire expressed in general terms in c. 1453 and revisited in c. 1465 § 3: "the judge is to ensure that litigation is not unduly prolonged by reason of the postponement."

A norm that provides that a lapse of time extinguishes a right must be interpreted restrictively (cf. c. 18).[6] Thus, the peremptory nature of a period of time cannot be presumed, but must be expressly provided, (as in c. 1621, which determines a ten-day period for presenting the plaint of nullity. When the judge indicates a peremptory time period, he must do so unequivocally (cf. cc. 1484 § 2, 1596 § 3).

The prorogable nature of a period of time does not depend on the peremptory nature of the time, if they are judicial or conventional times, because among these conventional times, there can be peremptory but prorogable times. On the other hand, if a time period established by law is peremptory, it is always non-prorogable, and is called a *time limit.* The first section of this canon establishes that time limits are "fixed times beyond which rights cease in law." Thus, as in c. 1634 § 1 *CIC*/1917, time limits cannot be postponed.

However, the current canon does allow for the possibility of shortening them at the request of the parties, because time periods involve the grant of a right, independent of the power of the judge. Therefore, by mutual agreement, the parties may waive a time period, but they may not be deprived of it by the judge or by an agreement between the judge and one party.[7] Therefore, it is insufficient that neither part object to the time reduction; they must request it. The judge cannot do so *sua sponte.* The agreement of the parties is a condition for validity for the reduction.

In contrast, *conventional* and *judicial* times, even if peremptory, can be postponed by a decision of the judge, who may establish non-prorogable times or make the conventional times non-prorogable. Although the canon does not expressly refer to them, the judge may also postpone non-peremptory legal times.[8] For judicial and conventional times and non-peremptory legal times to be prorogable by the judge, there must be just cause and a hearing for the parties, who may also request the postponement. To postpone judicial and conventional times, the judge must at least hear the parties, but he is not obligated to obtain their

5. Cf. L. DEL AMO, commentary on the chapter "De los plazos y prórrogas," in *Pamplona Com.*

6. Cf. L. CHIAPPETTA, *Il Codice di Diritto Canonico* (Naples 1988), no. 4737.

7. Cf. M.J. ARROBA, *Diritto processuale canonico* (Rome 1993), p. 268.

8. Cf. L.G. WRENN, "Processes," in *The Code of Canon Law, A Text and Commentary* (New York 1985), p. 964.

agreement. However, to shorten these times, the judge must have the agreement of both. If he does not hear them, the validity of the postponement is not affected, but if he does not obtain the agreement, the reduction will be invalid. In either case, it is the judge who decides: even if the parties agree or request a change in the time period, the judge may ignore their wishes.

This norm on the reduction of the times was not in the *CIC*/1917, c. 1634 of which only discussed postponement, prohibiting it if they were time limits and permitting it if they were conventional or judicial. The innovation facilitates the speediness of the process, and it is consistent with the elimination of the material contained in cc. 1854–1857 *CIC*/1917, which discussed "illegal procedures during the lawsuit."[9] These canons seemed useless, because illegal procedures were incidental matters that a judge ruled on *expeditissime*, with a decision that could not be appealed, unless it was together with an appeal of the definitive judgment. The Revision Commission opted in favor of reducing the illegal procedures to the innovations regarding the object of the dispute and of the terms and judicial times. Therefore, it was not necessary to retain the canons of the *CIC*/1917; it was sufficient to indicate the impossibility of these innovations with regard to the times and when discussing the joinder of issue.

Doctrine after the code grouped the effect of the time periods as follows[10]:

(1) the judge cannot, under penalty of nullity, hold any proceeding involving a matter on which a time period is granted; each party benefits from the time period granted to the other;

(2) the time period exempts the party to which it is granted from penalty and default;

(3) the lapse of the time period has the effect of an interlocutory judgment (unappealable: cf. c. 1629,4°) and prevents the act which is the object of the time period from being performed, unless there is a legitimate impediment or a greater cause. If this impediment does not exist and it is a peremptory time period, any subsequent procedural act will be null (regarding *acta processus* and *acta causae*, cf. c. 1472 and, in connection with the peremptory nature of the instance, c. 1522); and

(4) if there is impossibility, the judge may acknowledge it *ipso facto* and proceed without a prior interlocutory judgment.[11]

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9. Cf. *Comm.* 11 (1979), pp. 132ff; F. GIL DE LAS HERAS, "Organización judicial de la Iglesia en el nuevo Código," in *Ius Canonicum* 24 (1984), p. 146; J.L. ACEBAL, commentary on c. 1440, in *Salamanca Com*; A. QUINTELA, *El atentado en el proceso canónico* (Pamplona 1972).

10. Cf. F. ROBERTI, *De processibus*, cit., pp. 457ff; F.X. WERNZ-P. VIDAL, *Ius Canonicum*, cit., p. 165; E. E. FERNÁNDEZ REGATILLO, *Institutiones Iuris Canonici*, cit., p. 256; M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica...*, cit., pp. 266ff; F. DELLA ROCCA, *Istituzioni di diritto processuale canonico* (Turin 1946), p. 150.

11. Cf. F.X. WERNZ-P. VIDAL, *Ius Canonicum*, cit., p. 165.

Although traditionally it was understood that the legal and peremptory time periods *par excellence* were those established for the appeal,[12] c. 1633 provides that the judge *a quo* can establish a time longer than one month for pursuing an appeal. In this way, a term that in principle is a time limit can become a prorogable judicial term[13]; or, if it is admitted with c. 1635 that the time periods for the appeal are *time limits*, from the subparagraph of c. 1633, a failure of the principle of the non-prorogable nature of time limits is obvious.[14] That failure is highlighted when they are causes related to the status of persons, which never become an adjudged matter (c. 1643). A declaration of the Apostolic Signature of June 3, 1989[15] made it clear that if the appeal was not lodged or pursued (cf. cc. 1633 and 1635), or if there was a lapse or a waiver of the instance (cf. cc. 1520 and 1636), the party with the interest can always request a new examination of the cause, which it distinguishes from the *nova causae propositio*, because the "new and serious proofs or arguments," required by c. 1644 for proposing the cause after two conforming judgments, do not have to be presented. Therefore, it would be appropriate to appeal at any time, regardless of the conformity. Thus, the times established for the appeal in this type of cause is not peremptory.[16]

In short, in spite of the reticence shown in the revision of c. 1643, the result obtained in the final wording of the *CIC* is that the right to appeal does not lapse in causes on the status of persons. The instability and insecurity caused by that fact—accentuated in the documentary process, in which just one judgment *pro nullitate* can be executed immediately: c. 1682—could be mitigated, *de iure condendo*, by recovering the content of c. 1989 *CIC*/1917 (which seemed to be sought in the work of revising the *CIC*[17]), which required for viability of the *retractatio* the presentation of some new argument (not necessarily grave, unlike the *nova causae propositio*) on which to base a review of the case.

12. Cf. F. DELLA ROCCA, *Istituzioni di diritto processuale canonico*, cit., p. 149; P. MONETA, "L'appello," in P.A. BONNET-C. GULLO (Eds.), *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), p. 788.

13. Cf. L. DEL AMO, commentary on c. 1633, in *Pamplona Com.*

14. Cf. L.G. WRENN, "Processes," cit., p. 964.

15. Cf. Signatura, *Declaratio de foro competenti in causa nullitatis matrimonii, post sententiam negativam in prima instantia latam*, in *AAS* 81 (1989), pp. 988–990; also in *Ius Ecclesiae* 2 (1990), pp. 343–345; J. LLOBELL, "Centralizzazione normativa processuale e modifica dei titoli di competenza nelle cause di nullità matrimoniale," in *Ius Ecclesiae* 3 (1991), pp. 454ff.

16. Cf. P. MONETA, "L'appello," cit., pp. 789ff; idem, "La nuova trattazione della causa matrimoniale," in *Ius Ecclesiae* 3 (1991), pp. 481ff; idem, *La giustizia nella Chiesa* (Bologna 1993), p. 134.

17. Cf. J. LLOBELL, "Centralizzazione normativa processuale...," cit., pp. 456ff. To the contrary, Z. GROCHOLEWSKI, "L'appello nelle cause di nullità matrimoniale," in *Forum. A Review of the Maltese Ecclesiastical Tribunal* April 2, 1993, pp. 49ff.

1466 **Ubi lex terminos haud statuat ad actus processuales peragendos, iudex illos praefinire debet, habita ratione naturae uniuscuiusque actus.**

Where the law does not establish fixed times for concluding procedural actions, the judge is to define them, taking into consideration the nature of each act.

SOURCES: —

CROSS REFERENCES: cc. 1457, 1465 § 3

COMMENTARY

Miguel Ángel Ortiz

This canon is an innovation that satisfies the same desire which inspired § 3 of the c. 1466, namely that trials not go on interminably. It establishes that determination of the time periods, when left to the discretion of the judge, should not hinder obtaining the objective of the process: reestablishing justice.[1] Therefore, this canon serves to avoid conflicts and abuses that could obstruct the development of the cause: it constitutes a guarantee for the parties.[2]

The canon refers to *active time limits.*[3] When the law makes no mention of a precise time limit, the judge must give the parties a time limit to perform an activity. In doing so, he must take into consideration the nature of the act, the circumstances surrounding the cause (distance, health, or employment conditions of the parties, etc.), as well as the prohibition of c. 1465 § 3: "that litigation is not unduly prolonged by reason of the postponement."

Failure to comply with this canon could constitute cause for possible disciplinary sanctions, to the extent that a delay in the administration of justice due to a seriously negligent attitude by the judge causes damage to the parties. The judge would deserve to be punished "by the competent authority with appropriate penalties, not excluding the loss of office" (cf. c. 1457).

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1. Cf. P.A. BONNET, "Processo. XIII. Processo canonico: profili generali," in ISTITUTO DELLA ENCICLOPEDIA ITALIANA (G. TRECCANI), *Enciclopedia Giuridica*, XXIV (Rome 1991).
2. Cf. F. GIL DE LAS HERAS, "Organización judicial de la Iglesia en el nuevo Código," in *Ius Canonicum* 24 (1984), p. 146.
3. Cf. L. DEL AMO, commentary on c. 1466, in *Pamplona Com.*

As a manifestation of the principle that shapes this canon, as well as the vigilance exercised by the Apostolic Signatura over the proper administration of justice (c. 1445 § 3,1° and Art. 124,1° *PB*), outlying tribunals must state in their annual reports to the Signatura "whether the judicial and conventional time periods are observed, and if the causes finish as soon as possible in the first and in the second instance."[4] The tribunals must also report whether judgments are drafted no later than one month from the date of the decision, with publication no later than two months from date of the decision.[5]

4. Cf. Signatura, *Carta circular a los Presidentes de las Conferencias Episcopales sobre el estado y actividad de los Tribunales eclesiásticos,* December 28, 1970, a. III, 4, in *AAS* 63 (1971), pp. 480ff.
5. Cf. ibid., a. III, 7.

1467 Si die ad actum iudicialem indicto vacaverit tribunal, terminus intellegitur prorogatus ad primum sequentem diem non feriatum.

If the day appointed for a judicial action is a holiday, the fixed term is considered to be postponed to the first subsequent day that is not a holiday.

SOURCES: c. 1635

CROSS-REFERENCES: cc. 200–203, 1247, 1468

COMMENTARY

Miguel Ángel Ortiz

The norms on fixed terms are complemented by the norms containing the general criteria on calculating time (see commentary on cc. 200–203).

The time of the term begins to run on the day the interested parties are notified. Regarding the calculation of the initial and final times of the terms, the principle *dies a quo non computatur in termino, dies ad quem computatur in termino* governs: the day of the notification *a quo* is not included in the term, while the last day (the day *ad quem*) is.

The criteria on the calculation of time vary according to whether it is *useful* or *continuous* time (c. 201). Continuous time is not interrupted; it is calculated taking into account only the initial and the final moment, from date to date. On the other hand, useful time is counted in such a way that days on which the required act cannot take place due to ignorance, an impediment, or another cause, are not counted. The occurrence of the impediment interrupts or suspends the calculation of time.[1]

Do holidays falling in the course of useful time interrupt the calculation? This is recognized in the Spanish system (because days on which any procedural act cannot take place do not enter into the calculation by days),[2] but canonical doctrine does not admit this interruption. According

1. Cf. F. DELLA ROCCA, *Istituzioni di diritto processuale canonico*, (Turin 1946), p. 150; A. DEL AMO, commentary on c. 1467, in *Pamplona Com.*
2. Cf. A. DE LA OLIVA-M.A. FERNÁNDEZ, *Derecho procesal civil*, II (Madrid 1990), p. 119.

to canonists after the *CIC*/1917, "if holidays fall in the course of the term, they are counted."[3]

If the last day of the term (the day *ad quem*) is a holiday or non-canonical day, the first canonical day is understood to be postponed. This can be concluded from c. 1467, which contemplates the case in which the tribunal is closed on "the day appointed for a judicial action." That canon follows the *CIC*/1917, as well as the solution common to civil systems.

Classical doctrine agreed to consider judicial and conventional periods as useful time and legal periods as continuous time.[4] The *CIC* does not contain any presumption in favor of one type of calculation or another. However, it is generally understood that time is continuous, unless stated otherwise. Useful time must be determined explicitly or implicitly by law, or expressly by the judge.[5] It is implicitly useful if it is granted as a favor, and no burden or damage to others results.[6] In the procedural sphere, the *CIC* expressly defines time as useful in the following cases:

— an appeal against the acknowledgment of incompetence on the part of the judge (c. 1460 § 3);

— for presenting evidence (c. 1516 and 1599 § 2);

— for presenting pleadings and observations (cc. 1601 and 1606);

— for presenting the appeal (cc. 1630 § 1 and 1641, 2);

— for issuing the deferred judgment in the oral contentious process (c. 1668 § 2).

The provision of an automatic postponement if the last day of the term or a specific day for a procedural act falls on a non-canonical day demonstrates that it is appropriate for the internal regulation of the tribunal to clearly establish the calendar (c. 1602 § 3; see commentary on c. 1468).

The current c. 1467 contains a minor difference with respect to its precedent, c. 1635 *CIC*/1917. The *CIC*/1917 provided that "if the day indicated for the judicial act is a holiday and the decree of the judge does not expressly state that the tribunal will act anyway, the term is understood to be postponed to the next non-holiday day." The change allows that not only holidays but other days determined in the regulation will be considered non-canonical days. However, it does not exclude the possibility expressly permitted in the *CIC*/1917, that the judge may establish in the

3. Cf. F. DELLA ROCCA, *Istituzioni di diritto processuale...*, cit., p. 150; F. ROBERTI, *De processibus*, I (Rome 1956), p. 456; F.X. WERNZ-P. VIDAL, *Ius Canonicum, VI (De processibus)* (Rome 1949), p. 166; M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica iuxta Codicem Iuris Canonici*, I (Rome 1950), p. 268.

4. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica...*, cit., p. 267.

5. Cf. M.J. ARROBA, *Diritto processuale canonico* (Rome 1993), p. 269.

6. Cf. L. CHIAPPETTA, *Il Codice di Diritto Canonico* (Naples 1988), no. 1178.

decree that, although it is a holiday, the tribunal will proceed. In that case, the term would not be postponed, because the last day has been made useful by the judge.[7] This is recognized in c. 1639 § 2 *CIC*/1917: the judge may determine that the proceedings indicated in § 1 of the same canon may be held on holidays (see commentary on c. 1468).

7. Cf. F. GIL DE LAS HERAS, "Organización judicial de la Iglesia en el nuevo Código," in *Ius Canonicum* 24 (1984), pp. 146ff; L. CHIAPPETTA, *Il Codice di Diritto Canonico*, cit., no. 4741.

CAPUT IV
De loco iudicii

CHAPTER IV
The Place of Trial

1468 **Uniuscuiusque tribunalis sedes sit, quantum fieri potest, stabilis, quae statutis horis pateat.**

As far as possible, the place where each tribunal sits is to be an established office which is open at stated times.

SOURCES: cc. 1636, 1638 § 1

CROSS-REFERENCES: cc. 469, 1244, 1246–1247, 1467, 1602 § 3

COMMENTARY

Miguel Ángel Ortiz

After having discussed time requirements in the previous chapter, the canons making up this chapter briefly discuss requirements as to the physical office in which the tribunal performs its function, as well as the territory normally determining its competence.

The tribunal normally administers justice in a given office, the hours of which must be clearly established. The function performed there requires conscientious decorum. If in civil tribunals respect for the court is ordered, there is all the more reason why attitudes, gestures, and words used in the ministry exercised in the tribunal should contribute to the edification of souls, both when the truth is being investigated and when justice is rendered.[1]

The provision of the first canon of the chapter is conditional on the *possibility* of its compliance ("as far as possible"), which conditions the validity requirements of proceedings. Canon 1648 determines that *every*

1. Cf. L. DEL AMO, commentary on the chapter "Del lugar del juicio," in *Pamplona Com.*

tribunal must have *as far as possible* an established office, regardless of its scope of jurisdiction. The bishop may establish the office of the tribunal in any location within the scope of his jurisdiction. Normally, it will be in the office of the diocesan curia. Canon 1636 *CIC*/1917 specified that the office of the tribunal must be "in the episcopal see."

The drafters of this canon felt it was unnecessary to retain two specifications from c. 1636 *CIC*/1917: that a crucifix must dominate the room and that the Gospels must be found therein. On the other hand, in the room designated by the bishop as the office of the tribunal, "the trials will ordinarily take place." Logically, if an office for the tribunal must be obtained, it is for judging to take place there, but it can be otherwise if there is just cause, provided that it normally takes place within the territory of the diocese or dioceses that constitute the tribunal. When it is a tribunal of a subsequent instance (e.g. that of the diocese of the Metropolitan: cc. 1438 et. seq.), that limitation does not apply. The same must be concluded concerning apostolic tribunals, tribunals of personal circumscriptions (cf. c. 372 § 2: *SMC*, XIV), and tribunals of religious.

Concerning the office, it does not constitute a validity requirement (provided that the activity takes place within the jurisdiction of the tribunal) nor a lawfulness requirement, if there is reasonable cause. There can be judging without a proper office if it is impossible to establish one and, if one is established, judging may take place outside it if there is sufficient cause.

The canon also refers to the schedule of the tribunal. In addition to simplifying the provisions of c. 1636 *CIC*/1917, c. 1468 also has incorporated the provisions of c. 1638 *CIC*/1917. Paragraph 1 of c. 1638 *CIC*/1917 established that the ordinary had to "establish by public decree the appropriate days and times, according to the circumstances of time and place, in which one could normally go to court and demand that justice be administered." Paragraph 2 of the same canon admitted that, with just cause and as often as there was danger in a delay, the parties could go to the judge to defend their rights or the public good. In the revision of the *CIC*, all provisions regarding the days and times in which the tribunal would be open were eliminated. Canon 74 of the 1976 *Schema*, which set forth the content of cc. 1638 and 1639 *CIC*/1917, stated: "the Bishop must establish by public decree at which time one may go to the tribunal" (no. 1) and on which days any or all judicial acts could not take place, *nisi ex causa necessitatis* (no. 2). Both provisions were felt to be unnecessary, because they could be redirected to the bishop's duty to ensure that due order be observed in the diocesan curia. Consequently, the phrase "that [the office of the tribunal] will be open at specific hours"[2] was added.

2. *Comm.* 10 (1978), p. 261.

The regulations of the tribunal shall determine its calendar and schedule (cf. c. 1602 § 3). The schedule and regulations of the tribunal shall be similar to the schedule and regulations of the entire diocesan curia, to which belong organisms and persons who collaborate with the bishop in the exercise of judicial power (cf. c. 469). Naturally, the calendar (which may be established by the bishops' conference, to guarantee unity in its territory[3]) shall develop the provision that c. 1639 § 1 *CIC*/1917 established for the entire church: "The holy days of obligation and the last three days of Holy Week shall be considered holidays; and on these days it is forbidden to serve citations, hold hearings, question the parties or the witnesses, receive evidence, issue decrees or judgments, serve notice thereof or execute them, unless necessity, Christian charity or the public good demand otherwise." Except for the holiday aspect of Sundays and other holy days of obligation established for the Church as days on which the faithful normally refrain from work (cf. cc. 1244 and 1246–1247), the particular legislator may (in addition to eliminating or moving some of those holidays: cf. c. 1246 § 2) adapt the calendar and work schedule of the curia to the local and civil holidays of the territory.

There does not seem to be any particular difficulty in safeguarding the validity of acts performed outside the established schedule or calendar if there is just cause dictated by "necessity, Christian charity, or the public good" (cf. c. 1639 § 1 *CIC*/1917). Moreover, a sanction of nullity for these acts would have to be expressly established (cf. c. 18). The only limitation is in the territory or, in the case of personal jurisdictions, the proper scope of jurisdiction, referred to in c. 1469.

3. Cf. J. LLOBELL, "Centralizzazione normativa processuale e modifica dei titoli di competenza nelle cause di nullità matrimoniale," in *Ius Ecclesiae* 3 (1991), p. 443.

1469 **§ 1. Iudex e territorio suo vi expulsus vel a iurisdictione ibi exercenda impeditus, potest extra territorium iurisdictionem suam exercere et sententiam ferre, certiore tamen hac de re facto Episcopo dioecesano.**

§ 2. Praeter casum de quo in § 1, iudex, ex iusta causa et auditis partibus, potest ad probationes acquirendas etiam extra proprium territorium se conferre, de licentia tamen Episcopi dioecesani loci adeundi et in sede ab eodem designata.

§ 1. A judge who is forcibly expelled from his territory or prevented from exercising jurisdiction there can exercise his jurisdiction and deliver judgement outside the territory. The diocesan Bishop is, however, to be informed of the matter.

§ 2. Apart from the circumstances mentioned in § 1, the judge, for a just reason and after hearing the parties, can go outside his own territory to gather proofs. This is to be done with the permission of, and in a place designated by, the diocesan Bishop of the place to which he goes.

SOURCES: § 1: c. 1637

CROSS-REFERENCES: cc. 1418, 1468, 1558 § 3

COMMENTARY

Miguel Ángel Ortiz

Canon 1468 allows one to conclude that the judge exercises his jurisdiction validly in his territory and, normally (although it is not a validity requirement) in the office of the tribunal. Except for the principle that the judge administers justice only in the specific territory (*extra territorium iusdicenti non paretur impune*[1]), this canon contemplates the possibility that he may act outside his territory, as an exception. That possibility constitutes an exception to the principle set forth in c. 201 § 2 of the *CIC/* 1917: "the judicial power ... cannot be exercised ... outside the territory, except as provided in the canons ... and 1637." By not retaining in the current text a norm similar to c. 201 § 2 *IC* 17, this canon does not constitute an exception to a norm that invalidates the exercise of jurisdiction outside

1. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica iuxta Codicem Iuris Canonici*, I (Rome 1950), pp. 268ff.

the territory, but an exception to the normal manner of exercise. Therefore, if the tribunal is competent it may validly and lawfully exercise this competence outside the territory, if there is just cause. Otherwise, disciplinary sanctions could be imposed, although these would not affect the validity of the judgment pronounced.

This chapter contemplates the ordinary case of jurisdiction based on territory, but in view of the exceptions that the territory principle admits,[2] it must be applied by analogy to cases of personal jurisdiction.

Canon 1469 provides a consequence of the general principle that prohibits the exercise of jurisdictions *extra territorium* (or outside the sphere of the proper jurisdiction, in personal circumscriptions). Therefore, as a result, the bishop may only grant the delegation (of jurisdiction or of competence) within the sphere of his circumscription; he cannot, then, grant the competence to a tribunal of another bishop, not even with the consent of this other bishop. Canon 1469 § 1 sets forth the provision of c. 1637 *CIC*/1917: if the judge was expelled by force or prevented from exercising jurisdiction in his territory, he can even give a judgment. On the other hand, § 2 contemplates the possibility that the judge may leave the territory to gather proofs.

The first paragraph copies the text of c. 1637 *CIC*/1917, with the only change being the authority that must be informed of the judge's move. In the *CIC*/1917, it was the local ordinary, while in the current text, it is the diocesan bishop (and similarly: cf. c. 134 § 3; although this canon refers to the scope of the executive power, it can be understood to apply to this situation). The bishop of the place to where the expelled or impeded judge was transferred must not grant any authority. He must only be informed of the move; in the event of a conflict, the right of the impeded judge over the bishop must prevail.[3] Doctrine has felt that either the report to the bishop (to the ordinary, in the preceding text) was not required *ad valorem*,[4] or in its absence (which, according to that doctrine, gave rise to relative incompetence), it was remediable pursuant to c. 209 *CIC*/1917, which regulated substitution of jurisdiction.[5] The first doctrine also discussed the exercise of jurisdiction in an exempt location within the same territory, as well as the exercise outside of the territory without any expulsion or impediment. In either case, the tendency was towards the sanction of invalidity.[6]

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2. Cf. L.G. WRENN, "Processes," in *The Code of Canon Law, A Text and Commentary* (New York 1985), p. 964; J.L. ACEBAL, commentary on c. 1469, in *Salamanca Com.*
3. Cf. F. ROBERTI, *De processibus*, I (Rome 1956), p. 461; F. DELLA ROCCA, *Istituzioni di diritto processuale canonico* (Turin 1946), p. 152; L. CHIAPPETTA, *Il Codice di Diritto Canonico* (Naples 1988), no. 4744.
4. Cf. E. FERNÁNDEZ REGATILLO, *Institutiones Iuris Canonici*, II (Santander 1951), p. 256.
5. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica...*, cit., p. 272.
6. Cf. ibid., p. 269; F. ROBERTI, *De processibus*, cit., pp. 459ff.

On the other hand, § 2 is new.[7] It grants the judge the authority to go outside his territory to perform some acts of instruction ("to gather proofs"). The possibility offered in this canon is an alternative to the one that provides for judicial assistance (cf. c. 1418: in this canon, it is acknowledged that every tribunal has the right to ask another tribunal to perform acts of instruction or notification). Canon 1558 § 3 (following the provision of c. 1770 § 2,3° *CIC*/1917) also establishes that, when it is difficult or impossible for witnesses to go to the office of the tribunal, the judge shall decide where to hear them. If they reside outside the territory of the diocese, the assistance of another tribunal will be used, or the tribunal will personally move to that territory, in accordance with the provisions of this canon.

Thus, a judge seeking to gather evidence in a territory other than his jurisdiction, must have just cause, hear the parties (without having to obtain their approval), obtain permission from the diocesan bishop of the territory to which he is going, and act in the office determined by this bishop. The canon does not sanction with nullity any failure to obtain permission. Therefore, although authorization from the bishop is advisable for avoiding any kind of abuse, it does not seem to be a requirement for the validity of the acts of instruction.[8] In fact, this permission is not a delegation of power. The judge does not gather the evidence with power delegated from the bishop, but exercises the power he already possesses independently of the permission requested (on the delegation of power, see also the introduction to the title "The Competent Forum").

However, in 1970 (when there was no norm similar to c. 1469), the Tribunal of the Apostolic Signature answered affirmatively the question of whether the tribunal of the Vicariate of Rome needed authorization from the local ordinary to perform procedural acts outside his territory. The answer was that, since it is not an apostolic tribunal, the tribunal of the vicariate needs authorization that is not merely license, but necessary delegation *ad validitatem*.[9] However, in view of c. 1469, permission from the bishop is only required for the liceity of the acts, if these acts are merely the gathering of proofs.

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7. Cf. *Comm.* 10 (1978), p. 261.

8. Cf. L. CHIAPPETTA, *Il Codice di Diritto Canonico*, cit., no. 4745; P.V. PINTO, *I processi nel Codice di Diritto Canonico. Commento sistematico al Liber VII* (Vatican City 1993), p. 180. To the contrary, F. GIL DE LAS HERAS, "Organización judicial de la Iglesia en el nuevo Código," in *Ius Canonicum* 24 (1984), p. 147.

9. Cf. X. OCHOA, *LE Ecclesiae*, V, no. 4130; P.V. PINTO, *I processi nel Codice di Diritto Canonico...*, cit., p. 181.

CAPUT V
De personis in aulam admittendis et de modo conficiendi et conservandi acta

CHAPTER V
Those Who May Be Admitted to the Court and the Manner of Compiling and Preserving the Acts

1470 **§ 1. Nisi aliter lex particularis caveat, dum causae coram tribunali aguntur, ii tantummodo adsint in aula quos lex aut iudex ad processum expediendum necessarios esse statuerit.**

§ 2. Omnes iudicio assistentes, qui reverentiae et oboedientiae tribunali debitae graviter defuerint, iudex potest congruis poenis ad officium reducere, advocatos praeterea et procuratores etiam a munere apud tribunalia ecclesiastica exercendo suspendere.

§ 1. Unless particular law prescribes otherwise, when cases are being heard before the tribunal, only those persons are to be present whom the law or the judge decides are necessary for the hearing of the case.

§ 2. The judge can with appropriate penalties take to task all who, while present at a trial, are gravely lacking in the reverence and obedience due to the tribunal. He can, moreover, suspend advocates and procurators from exercising their office in ecclesiastical tribunals.

SOURCES: § 1: c. 1640 § 1
§ 2: c. 1640 § 2

CROSS REFERENCES: cc. 1336, 1457 §2, 1487–1489, 1559, 1560 § 1, 1598, 1656–1670, 1678 §§1 et 2

COMMENTARY

Thomas G. Doran

This last chapter of the title or section treating of the discipline and proprieties of a Church trial gives norms for regulating the access of persons other than the judges and officers of the court to the actual place where the proceedings are being held, and for the compilation and safekeeping of the documents which record those proceedings. There is a certain nicety in combining the two somewhat disparate subjects in one chapter. Few ecclesiastical trials in the ordinary dioceses of the Church are conducted with the pomp and circumstance to which the higher tribunals of states and nations pretend. It should not be forgot, though, that the same decorum which marks the latter should by rights attend the former, the more so because our processes are ordinarily written, and the production of an accurate and fair written record of those processes demands a concentration and perseverance which preventable disorder, contrived confusion, and courtroom theatrics of whatever sort preclude. The treatment of these matters in the *CIC*, as so often elsewhere in this new legislation, follows the *CIC*/1917, while giving the norms a more positive tone and tint than perhaps was possible before.

1. The ideal to be sought is that pronouncements made in the name of justice be manifest at large. Consequently, a certain public character must attend all judicial proceedings worthy of the name. In the civil and criminal proceedings of the state, it is the rule that everything take place in "open court"—that is, in full view of the public and under the relentless scrutiny of press and people alike, come what may. Only rarely do civil magistrates sanction departure from this (as in certain judicial proceedings involving juveniles and the testimony of very young children, or to protect state secrets whose revelation would, in the eyes of the judges, damage the public good).

The matters which frequently are the subject of ecclesiastical trials, while they surely touch the public good, are usually much more delicate, particularly when they are matters involving the status of persons (invalidity of marriage, and penal cases, for example), and so of their nature demand a certain reserve of the tribunals that treat of them. To deal with church matters in the manner in which civil tribunals deal with their own affairs would expose the church courts to the same abuses which have lately come to mark, if not to characterize, the civil proceedings of many countries—abuses, moreover, which church tribunals in most countries lack the policing power to control, correct, repress, or punish.

So the public character of church court proceedings, while maintained, is subject to more exacting guidance (for example, contrast the question of publicity in this canon with the notion used in c. 1598).[1] This canon leaves it to the judge to determine who shall be present in all those cases where the law itself does not make a determination, as the Code itself does, for example, in cc. 1559; 1560, §1; 1663, §2; 1678, §§1–2, and as the particular law may do in its turn, as the canon provides in its opening clause. The criterion the judge is to use is a simple one: the judge may permit the presence of any and all who are needed to forward the process to its end. One commentary sums it up this way: "The necessary people at the hearing of a witness are, besides the judge or auditor, the notary, the defender, and the promoter when they are involved in the case and, in accord with c. 1559, ordinarily the procurators and advocates and sometimes the parties."[2]

The Code now in force has made ecclesiastical processes more public by providing for the usual presence of advocates and procurators, as well as their presence at the declarations of the parties, the depositions of witnesses and experts (c. 1559) and by the notable extension of oral processes and hearings (cc. 1656–1670).[3]

2. The public character of judicial proceedings, if it can be a check for the parties against the abuse of judicial power, can also, if uncontrolled, expose those same parties to harm.[4] So, those who do not maintain the proper decorum demanded by ecclesiastical proceedings are to be corrected, and the judge has the power to do this (as he does to correct tribunal ministers—cf. c. 1457, §2), first of all by calling them to task, and if that is not enough, to impose suitable penalties; and if that is not enough, in the case of advocates and procurators, by suspending them from the exercise of their functions before ecclesiastical tribunals (cf. cc. 1336, 1487–1489).

1. Cf. J.A. CORIDEN-T.J. GREEN-D.E. HEINTSCHEL, *The Code of Canon Law: A Text and Commentary* (New York 1985), p. 965a.
2. Ibid.
3. Cf. L. DEL AMO, commentary on ch. V, in *Pamplona Com.*
4. Cf. idem, commentary on c. 1470, ibid.

1471 Si qua persona interroganda utatur lingua iudici vel partibus ignota, adhibeatur interpres iuratus a iudice designatus. Declarationes tamen scripto redigantur lingua originaria et translatio addatur. Interpres etiam adhibeatur si surdus vel mutus interrogari debet, nisi forte malit iudex quaestionibus a se datis scripto respondeatur.

If a person to be interrogated uses a language unknown to the judge or the parties, an interpreter, appointed by the judge and duly sworn, can be employed in the case. Declarations are to be committed to writing in the original language, and a translation is to be added. An interpreter is also to be used if a deaf and dumb person must be interrogated, unless the judge prefers that replies to the questions he has asked be given in writing.

SOURCES: c. 1641

CROSS REFERENCES: c. 1492

COMMENTARY

Thomas G. Doran

The first complete sentence of this canon substantially repeats the apposite norm of the *CIC*/1917 (c. 1641 *CIC*/1917), to the effect that an interpreter is to be designated, or appointed, by the judge (either by decree or by directing the inclusion of the appropriate notation in the record of the judicial proceeding), and is to take an oath (either taken in the presence of the judge and the parties in open court as recorded by the notary in the record; or taken in the presence of the judge outside the court session and duly attested by the notary) conscientiously to carry out the charge committed to him. Though the first sentence of the abrogated canon contained the phrase "contra quem alterutra pars legitimam exceptionem non proposuerit," the present norm does not retain this provision, perhaps because it is elsewhere provided for (c. 1492). Certainly, should one or other party object to a particular interpreter for a serious reason, a judge would be almost compelled to select another.[1]

The second sentence of this canon contains material not part of the former legislation, to the effect the material interpreted is to be written down in the *original* language (the *CIC*/1917 required Latin—cf. c. 1642, §2 *CIC*/1917); to this verbatim transcript a translation is to be added. As

1. Cf. L. DEL AMO, commentary on c. 1471, in *Pamplona Com.*

Chiappetta remarks, this procedure certainly guarantees greater accuracy but also creates some difficulty for all concerned, and could certainly make the session in which the interpreter is used harder and lengthier; he suggests that perhaps it would be sufficient to append the interpreter's written record of the testimony to the translation.[2] The new canon further allows the judge to use an interpreter in the case of a person deaf or mute; but the judge in these cases may, if it be his preference, also allow such a witness to respond to his questions in writing. Perhaps the judge could allow one testifying in a foreign language to respond in writing, with the interpreter making a translation of the written testimony. Since the goal of the canon is to assure reasonable accuracy, it would seem that the judge would have some considerable latitude to that end.

2. Cf. L. CHIAPPETTA, *Il Codice di Diritto canonico: commentario giuridico-pastorale*, II (Naples 1988), p. 596, no. 4751.

1472 **§ 1. Acta iudicialia, tum quae meritum quaestionis respiciunt, seu acta causae, tum quae ad formam procedendi pertinent, seu acta processus, scripto redacta esse debent.**

§ 2. Singula folia actorum numerentur et authenticitatis signo muniantur.

§ 1. Judicial acts must be in writing, both those which refer to the merits of the case, that is, the acts of the case, and those which refer to the procedure, that is, the procedural acts.

§ 2. Each page of the acts is to be numbered and authenticated.

SOURCES: § 1: c. 1642 § 1
§ 2: c. 1643 § 1

CROSS REFERENCES: cc. 1522, 1608 § 2, 1705 § 3

COMMENTARY

Thomas G. Doran

1. This canon is a good one to remember for the concision with which it defines the *acts of the case*, and the *acts of the process*, and specifies the collective term embracing both, viz. *acta iudicialia* (but note the unfortunate usage—perhaps a *lapsus calami*—of c. 1705, §3). Those who eschew such distinctions should meditate upon canon 1522, where diverse effects accrue, in the case of preemption, to each type of judicial act: "Should the instance be terminated by preemption ... the 'acta processus' are extinguished but not the 'acta causae.'"[1] Acts of the case, of course, are those that deal with the merits of the question under judgment, and serve to resolve it, and include the proofs—declarations of the parties, depositions of witnesses, documents, reports of experts—and the sentence rendered. The acts of the processes are the procedural acts that are required by law to move the process along toward its completion, and include the concordance of the doubt, citations, summonses, notices, receipts certifying the acceptance of documents, the publication of the sentence, and such like.

1. J.A. CORIDEN-T.J. GREEN-D.E. HEINTSCHEL, *The Code of Canon Law: A Text and Commentary* (New York 1985), p. 965b.

All acts must be carefully put in writing, since they form one basis for the ultimate decision in the case (c. 1608, §2). Omitted from the *CIC* is the requirement (cf. c. 1642, §2 *CIC*/1917) that the judicial acts should be put into Latin (the *CIC*/1917 required only questions posed to witnesses and answers given and such to be in the vernacular). Those who work in international tribunals, however, often lament the uniformity of terminology that Latin gave us. Today there is a tendency, certainly not intrinsically evil, to use civil law equivalents for canonical terms. However, civil law terminology can vary widely, even among countries which use the same language. The *citatio* of our procedure is in English a "summons"; a "citation" in English can be a very different thing. When cases go to tribunals where not everyone is familiar with the language used in the acts, great confusion can occur where the Latin cognates of the vernacular words are not used. One tribunal used the word "study" to describe what is meant by a *causa nullitatis matrimonii* and would write to a defendant (*pars conventa*) that the tribunal "undertaking a study of your marriage." You can see what confusion would be engendered in the mind of a person who, thus informed, did not conclude that the "study" was really a form of judicial process in which his or her failure to participate would have consequences.

2. It seems a small thing to point out, but the numbering, besides being essential for using the acts, also is a protection against omissions or substitutions, whether accidental (as can happen in tribunals processing large numbers of cases) or intentional. An index of the acts is also essential to their easy uses. Provided the index is clear, any form may be used. Some tribunals separate the two types of judicial acts; others follow a sort of chronological order, which makes the process easy for the reader to follow. Cases which arrive in appellate tribunals with unnumbered pages and contents unindexed can have half-lives measured in untoward lengths.

The *CIC* prescribes that each page of the acts shall also bear a sign of authenticity (the old legislation had required each page to bear both the signature of the notary *and* the impression of the tribunal seal). Under the current legislation, either would be sufficient. A good sign of authenticity are the written initials of the notary *in some legible form.*

1473 **Quoties in actis iudicialibus partium aut testium subscriptio requiritur, si pars aut testis subscribere nequeat vel nolit, id in ipsis actis adnotetur, simulque iudex et notarius fidem faciant actum ipsum de verbo ad verbum parti aut testi perlectum fuisse, et partem aut testem vel non potuisse vel noluisse subscribere.**

Whenever the signature of parties or witnesses is required in judicial acts, and the party or witness is unable or unwilling to sign, this is to be noted in the acts. At the same time the judge and the notary are to certify that the act was read verbatim to the party or witness, and that the party or witness was either unable or unwilling to sign.

SOURCES: c. 1643 § 3

CROSS REFERENCES: cc. 1437 § 2, 1569

COMMENTARY

Thomas G. Doran

This provision of the *CIC* is word for word a repetition of the norm of the abrogated law (c. 1643, §3 *CIC*/1917). The provisions of this canon—notation of the inability or unwillingness of the party or witness to sign as required, and the double attestation (for *both* the judge *and* the notary are required to make this avowal) that the entire verbiage of the act in question has been read word for word to the party or witness who could not or would not affix his signature.

This provision seems to be a bit of "overkill," given the clear norm of c. 1437, §2 that "acts drawn up by notaries constitute pubic proof." However, its purpose is to allow for a proper evaluation of a proof or proofs which lack a signature where that defect might otherwise be given a significance it does not warrant. It should go without saying that every judicial act should contain its clearly legible date (day and month and year) and place of origin either at its heading or at its end, and the equally legible signatures of those in whose presence it was made. If the signatures are illegible, the name of each person should be printed or typed beneath his or her signature.[1]

1. Cf. J.J. García Faílde, *Nuevo Derecho procesal Canónico* (Salamanca 1984), p. 69. The question should be viewed in conjuction with the *iter* of the canon: cf. Comm. 10 (1978), p. 240.

1474 **§ 1. In casu appellationis, actorum exemplar, fide facta a notario de eius authenticitate, ad tribunal superius mittatur.**

§ 2. Si acta exarata fuerint lingua tribunali superiori ignota, transferantur in aliam eidem tribunali cognitam, cautelis adhibitis, ut de fideli translatione constet.

§ 1. In the case of an appeal, a copy of the acts is to be sent to the higher tribunal, with a certification by the notary of its authenticity.

§ 2. If the acts are in a language unknown to the higher tribunal, they are to be translated into another language known to it. Suitable precautions are to be taken to ensure that the translation is accurate.

SOURCES: § 1: c. 1644 § 1
§ 2: c. 1644 § 2

CROSS REFERENCES: cc. 1437, 1634

COMMENTARY

Thomas G. Doran

1. It should perhaps be remarked that this transmittal of all the judicial acts should be made *sua sponte* by the inferior tribunal to the superior one. It is neither required by our law nor is it advisable, given the lamentable state of postal services nearly everywhere, to send original acts or documents. In those rare and unusual cases where the original acts or documents themselves are needed by the superior court for its work, they should be sent with every possible precaution to insure their safe receipt in their entirety, and the tribunal sending original acts and documents should not neglect to retain in its archives an exact and complete copy of all original material sent.

It can help the work of the superior court if the attestation of authenticity made by the notary to accompany the copy of the judicial acts of a case also attests to the integrity of the acts. In order to do this it is necessary for the notary carefully to inspect the copy and to make a comparison between it and the original acts and documents. This is the more true when one is dealing with photographic or photostatic copies, because sometimes the machines which make such copies produce, whether because of wear and tear or by reason of simple misalignment, documents that are either incomplete or illegible, or both (sometimes the original is

overexposed or underexposed; sometimes the focus of the machine does not allow the registration on the copy of material at the very edges of the original document).

Tribunals whose own procedures allow the use of holographic material should never impose this usage on higher tribunals, since handwritten material not infrequently is poorly suited to photocopying, and because styles of penmanship vary so widely from place to place and nation to nation. For these reasons, such material should always be forwarded to the higher tribunal in duly authenticated typewritten form. Other questions about the details of the transmittal of acts to higher courts are dealt with below (c. 1633ff).

2. Judicial acts of cases appealed are to be furnished in a language known to the superior tribunal. The abrogated law's requirement that in this situation the acts be translated into Latin (c. 1644, §2) is not retained in the present Code. One must always take pains to insure a translation is exactly faithful to the original. A good precaution is to provide to the superior tribunal together with the translation a complete and authenticated copy of the original acts. In this way the superior tribunal may be able to satisfy its doubts should questions arise concerning the accuracy of the translation. For this reason, a superior tribunal may prefer to provide its own translations, and may be better equipped to do so.

1475 **§ 1. Iudicio expleto, documenta quae in privatorum dominio sunt, restitui debent, retento tamen eorum exemplari.**

§ 2. Notarii et cancellarius sine iudicis mandato tradere prohibentur exemplar actorum iudicialium et documentorum, quae sunt processui acquisita.

§ 1. When the trial has been completed, documents which belong to private individuals must be returned to them, though a copy of them is to be retained.

§ 2. Without an order from the judge, notaries and the chancellor are forbidden to hand over to anyone a copy of the judicial acts and documents obtained in the process.

SOURCES: § 1: c. 1645 § 1
§ 2: c. 1645 § 3

CROSS REFERENCES: cc. 469, 486–491, 1475 §2

COMMENTARY

Thomas G. Doran

1. Documents are private property, and are surrendered to tribunals on the understood condition that, when the tribunals no longer have need of them (not, of course, at the end of the instance, but when a definitive sentence has been rendered or the controversy has been otherwise concluded according to law), they will be restored in good condition to their owners. This norm guarantees fidelity to this practice. Before these documents are returned to their owners, however, the tribunal should take care to make a complete and accurate copy of them, to be retained in the public or secret archives of the Curia, according to the nature of the case (cf. c. 1645, §2 *CIC*/1917).

2. Canon 469 indicates that the tribunal is part of the diocesan Curia. Canon 1475, §2, however, "since it establishes a special rule regarding the conservation of judicial acts that is different from the rules that apply to other diocesan documents (cc. 486–491) suggests that the tribunal should have its own special archive."[2] The nature of the judicial process and the

2. J.A. CORIDEN-T.J. GREEN-D.E. HEINTSCHEL, *The Code of Canon Law: A Text and Commentary* (New York 1985), p. 965.

delicacy of the matters with which it deals as well require, indeed demand, that tribunal records of judicial acts be preserved with a custody that is both extremely conscientious and absolutely confidential. A decent regard for the honor of the Church and the privacy of its faithful requires no less. The retention of documents and their preservation in good condition and in usable form are the responsibilities of those who hold the offices of notary or chancellor in tribunals. Those who wish to use these materials—defenders of the bond, promoters of justice, judges—should do so in the tribunal's chancery. Except upon the clear and expressed order of a judge, tribunal notaries and chancellors are forbidden to give to anyone whomsoever a copy of the judicial acts or of documents acquired in the course of a process. Even though it is no longer a part of the law, the useful norm of the *CIC*/1917 is worthy of mention here, to the effect that, when a process has reached its legitimate end, anonymous letters that make no contribution to the merits of the case should be destroyed, together with any obviously calumnious writings (c. 1645, §4). In the course of a process many documents are accumulated which contribute nothing to the resolution of the case and whose retention serves no useful purpose.

TITULUS IV
De partibus in causa

TITLE IV
The Parties in the Case

INTRODUCTION

Carlo Gullo

1. All commentators stress that the *CIC* gives no definition of *party.* Consequently, it is doctrine, based on canonical norms as a whole, which has formulated its own notion. What is more, each writer has attempted to furnish his own definition, with all the limitations this entails, either with respect to the subject importance of the writers, or with respect to the objective content of their definitions.

In a recent study on the subject,[1] there is an attempt to unify these diverse positions, identifying three main theories. The first of these is a formalistic conception, disconnected from the substantial relationship in the cause (a position the writer of the study seems to share), by virtue of which "a party is the person who requests on his or her own behalf (or on whose behalf others request) an application of law, and the person against whom said application is requested." This position bears a relationship to Chiovenda and, for procedural canon law, to Roberti, Olivero and, more recently, to Bonnet and Grocholewski,[2] although Grocholewski seems to adopt a different position in another article. In this article, he maintains the need to consider as a party to an administrative proceeding not only the hierarchical authority confirming the administrative act, but also the

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1. Cf. I. ZUANAZZI, "Le parti e l'intervento del terzo nel processo canonico di nullità matrimoniale," in *Il processo matrimoniale canonico,* 2nd ed. (Vatican City 1994), pp. 323–391.

2. Cf. F. ROBERTI, *De processibus,* I (Rome 1956), pp. 510ff; G. OLIVERO, *Le parti nel giudizio canonico* (Milan 1941), pp. 21–22; P.A. BONNET, "Processo (diritto canonico)," in *Enciclopedia Giuridica,* XXIV (Rome 1991) pp. 5ff; Z. GROCHOLEWSKI, "Quisnam est pars conventa in causis nullitatis matrimonii?," in *Periodica* 89 (1990), pp. 366ff.

lower authority that has issued the decision, because it is the authority that has an "interest in the just resolution of the dispute."[3]

The second theory, attributable to Carnelutti,[4] recognizes as parties not only persons who have formal procedural relationship, but also persons with a substantial relationship.

The third theory, which may be defined as *teleological*, owes its authorship to Sarta and Punzi Nicolo. According to this theory, a party is only the person who has the interest that is in dispute and, therefore, only the person who has standing to sue or to file exceptions.[5]

There are several reasons for the first theory: "Acceptance of the petition—according to Zuanazzi—is only the presupposition for proceeding with the trial and extending the process to include the respondent, but not for having the plaintiff considered a party, which was acquired at the time of the *petitio*. This condition is deduced from the fact that the filing of the petition has the effect of creating specific rights and oSbligations between the plaintiff and the trier. In particular, the plaintiff has the right to obtain a pronouncement on the petition within a month from its filing and the right to challenge the decree of rejection by the presiding or sole judge, before the college or the appeals tribunal. Moreover, the plaintiff's position is juridically guaranteed on the basis of c. 1506, which provides that the petition must be deemed admitted *ipso iure* if the judge has not admitted the decision within ten days of the request made by the interested party one month after the filing of the petition. By virtue of the above analysis, it is evident that the legislator attributes to the lodger of a *petitio*, even before the formal acceptance decision, party status in the formal sense: that is, as the whole of the subjective juridical situations guaranteeing the right to begin a proceeding in order to prove the truth."[6]

Moreover, the law uses the term *plaintiff* to identify the person who orally presents the petition (c. 1503 § 1), the person to whom the notary reads it, once it has been written down (c. 1503 § 2), and the person who signs the petition (c. 1504, 3°). Even before the petition is accepted, the judge must see *si sine dubio constet actori legitimam deesse personam standi in iudicio* (c. 1505 § 2,2°). After the petition is rejected, it can be presented *actor novum libellum*, and *the party* may lodge a recourse with the higher judge against the rejection.

3. Cf. Z. GROCHOLEWSKI, "La parte resistente nei processi contenzioso-amministrativi presso la Segnatura Apostolica," in *Iustus iudex, Studi in onore di Wesemann* (Essen 1990), p. 474 and especially pp. 477ff.

4. Cf. F. CARNELUTTI, *Lezioni di diritto processuale civile*, II (Padova 1926), p. 231.

5. Cf. S. SATTA, "Il concetto di parte," in *Scritti giuridici in onore di F. Calamandrei*, III (Padova 1958), pp. 691ff; A.M. PUNZI NICOLÓ, "Parte (diritto canonico)," in *Enciclopedia del diritto*, XXXII (Milan 1981), in particular pp. 975ff.

6. I. ZUANAZZI, "Le parti...," cit., pp. 359–360.

Is all this enough to give party status to a person who requests that the judge perform his function? It seems not. The law, albeit generically, describes the plaintiff as the person who *potest in iudicio agere* and the respondent as the person who *respondere debet* (c. 1476). However, the *process* does not begin with the presentation of the petition, but with the constitution of the procedural relationship,[7] the citing of the respondent by the judge (c. 1512). This explains why the judgment is irremediably null, not only if *iudicium factum est sine iudiciali petitione*, but also *if non institutum fuit adversus aliquam partem conventam* (c. 1620,4°). Nor does the process end with the death of the respondent (cc. 1517–1518), but with the end of the matter of the litigation, with an absence of an interest, because the interest has been satisfied, *etc.*

The defect in the formalistic conception of *party* is found in the attempt to transfer to the canonical process a theory that is modeled on the Italian civil process by the procedural law expert, Chiovenda. However, the problem is that the Italian civil process generally is a process *of* parties, which does not include the admission or rejection of the petition, *etc.*, while the canonical process is a process *between* parties.[8] In the Italian process, the procedural relationship is constituted directly through the citation made by one subject to the other; in the canon process, the procedural relationship is constituted by an act of the judge who, once the petition is admitted, cites the other interested party.[9]

Therefore, when canon law refers to the *plaintiff* before the petition is admitted and before the resulting citation, it uses improper terminology, which refers to formalistic but non-substantial concepts. Before the admission of the petition and the resulting citation, there is no respondent; therefore, there cannot be a plaintiff either, but only a legitimate expectation of being considered as such.

In order to be considered the plaintiff, it is insufficient merely to request that the judge exercise his function. Something else is necessary, namely for the judge to recognize that in the petition presented to him there is the *fumus boni iuris* of the existence of a subject right or interest of the respondent. Then it follows that the true and proper process will unfold "in order to decide if the plaintiff is the person whose petitioned right must be acknowledged. But when even the *fumus boni iuris* is lacking, the process does not begin and the subject making the request does not become a party."[10]

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7. Cf. A. COMOLLI, *La costituzione del rapporto processuale canonico* (Milan 1970).

8. Cf. P.A. BONNET, "Processo...," cit., p. 6; S. VILLEGGIANTE, *Il diritto di difesa delle parti nel processo matrimoniale canonico* (Rome 1984), pp. 16–17.

9. Cf. S. SATTA, *Diritto processuale civile* (Padova 1959), p. 67; F. ROBERTI, *De processibus*, cit.; M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, I (Rome 1950), p. 296; J.J. GARCÍA FAÍLDE, *Nuevo derecho procesal canónico* (Salamanca 1984), pp. 31–33.

10. A.M. PUNZI NICOLÓ, "Parte (diritto canonico)...," cit., p. 976.

This concept, if it is noted that, at the time of the admission of the petition, the judge must verify (c. 1505 § 2,3°) *quo iure innitatur actor* (c. 1504,2°), and especially *si sine dubio constet actori legitimam deesse personam standi in iudicio* (c.1505 § 2,2°), or *petitionem quolibet carere fundamento* (c. 1505 § 2,4°). Therefore, the judicial organ cannot make merely formal assessments. An essential point for attributing the status of party is an assessment of the *fumus boni iuris* regarding the existence of an *interest* (occasionally referred to as an *obligation*, a term which can only presuppose the existence of an interest[11]).

Thus, it is inappropriate to maintain that the plaintiff who has obtained a judgment of nullity of marriage has the right to lodge an appeal against a judgment *pro nullitate*. This is because, since canon law requires a double conforming judgment to make decisions in matrimonial causes executable, the plaintiff who has obtained a favorable judgment can be considered obligated, even if it is only *a iure.*[12] In any event, in this case, the obligation and the resulting interest are the typical element referring to the party.

The fundamental norm with respect to the introduction of the petition states that the judge cannot hear any cause unless the petition *proposita sit ab eo cuius interest* (c. 1501). Without an interest, there is no right to action and, consequently, no party status. Only the intervention in a cause by a party who is defending his or her own right is admitted to *is cuius interest* (c. 1569 § 1). A cause may be resumed by the heir of the deceased, or by his successor, *aut is cuius intersit* (c. 1518,1°). Administrative recourse can be lodged only *quoties quis gravatum se decreto putet* (c. 1733 § 1; cf. c. 1737 § 1).

Therefore, canon law demands the existence of substantial requirements for party status, specifically a material or spiritual interest. The *reason* for this is the principal of judicial economy, according to which it is useless to perform an activity that compromises the public authority when the petition is devoid of any basis. It also is supported by the fact that the Church "can never dispense with the truth (the right with respect to the *res in iudicium deducta*) in order to replace it with a formal fact (the mere introduction of the cause)."[13]

If an interest is the element that law requires for identifying the parties, this interest must be used to identify both the plaintiff and the respondent, albeit more so in processes that have a predominantly private object than those that more directly consider the *bonum publicum.* While in processes with a predominantly private object a conflict of interests is typical,

11. Cf. P. MONETA, "I soggetti nel giudizio amministrativo ecclesiastico," in *La giustizia amministrativa nella Chiesa* (Vatican City 1991), p. 65.
12. Cf. C. POMPEDDA, decr., December 14, 1992, in *Il Diritto Ecclesiastico* (1993), II, p. 115, no. 4ff.
13. A.M. PUNZI NICOLÓ, "Parte (diritto canonico)...," cit., p. 976.

in processes with a predominantly public object, this conflict could be absent, giving rise to a process with co-interested parties, because "the contrast of interests is not at all essential for the parties as an institution, because there may or may not be a conflict without the process of the opposing parties suffering structural modifications."[14] In this sense, it is typical in a matrimonial process of nullity of the bond for both spouses to manifest an interest in the declaration of nullity for the same reasons. In this case, not only is there no contrast between the two spouses, but the interest of the Church as *societas fidelium* is not necessarily in conflict with those same persons. In fact, "the private parties, motivated by an extremely personal interest, by involving situations with much spiritual importance, are situated before the authority of the Church, which is obligated as they are and interested as they are ... in seeking the truth."[15]

That the respondent cannot be identified by the mere indication that the plaintiff makes in the petition (*a quo petatur*, as stated in c. 1504,1°), is implied from the fact that the judge cannot create the procedural relationship if, in view of the petition, the subject specified by the author would not in any event be obligated to grant what is requested by the person seeking justice.

For example, if a subject requests reparation of damages from an ecclesiastical juridical person, the subject must sue its legal representatives, not the ordinary, because *Ordinarium non administratorem esse entium ecclesiasticorum in dioecesi, sed super iisdem habere tantummodo vigilantiam atque supremum moderamen.*[16] Therefore, the ordinary does not acquire party status, or even that of a necessary intervening third party, because the need for intervention *debet apparere iudici qui causam pertractat* (c. 1597) and not only to the plaintiff.[17] Although the judge must decide at the end of the cause that the plaintiff has in fact suffered damage, the damage will not be reimbursed by the ordinary, but by the interested juridical persons.

2. According to the jurisprudence of the Apostolic Signatura, the typical interest for acknowledgment of party status must be direct, personal, current, and protected by law[18]:

—*personal*, that is, it must particularly affect the person of the subject seeking justice (or in whose name it is sought: cf. c. 1480 § 2);

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14. G. GUARNERI, "Parti (Diritto processuale penale)," in *Novissimo Digesto Italiano*, XII, Turin 1965, pp. 501ff.
15. A.M. PUNZI NICOLÓ, "Parte (diritto canonico)...," cit., p. 975.
16. TRR, *Brixien.*, C. POMPEDDA, decr., November 22, 1982, no. 15 (unpublished).
17. Cf. Signatura, *Brixien.*, March 30, 1985, C. SABATTANI, no. 9, prot. 15480/83 CG. (unpublished).
18. Cf. Signatura, C. CASTILLO LARA, November 21, 1987, in *Comm.* 20 (1988), p. 91, no. 4; Signatura, *Chicagien.*, C. FAGIOLO, June 20, 1992, no. 7, prot. 22036/90 *CAd.*

— *current*, that is, it must still belong to the subject requesting intervention by the judge (e.g. the interest of the person who has transferred an asset the use of which someone is preventing or the ownership of which is in dispute is no longer current)

— *direct*, that is, it must deal with a specific interest of a given subject, not a generic interest, which at most gives standing for requesting a grace, not the acknowledgment of a right.[19] It is true that the fact that the dicastery of the Roman Curia is before the *Sectio Altera* of the Signatura as a party in causes, which has limited itself to deciding the hierarchical recourse (*PB* 123 § 1), does not seem to be in agreement with this principle, because the dicastery does not have a direct interest in whether the act is being judged legitimate. The direct interest is that of the private subject or that of the lower ecclesiastical public administration. Regarding the higher ecclesiastical entity, there are no consequences. However, in these causes, the party status that is recognized for the dicasteries of the Roman Curia does not substitute for the presence in the process as a party, personally on one's behalf, of the directly interested party.[20] Moreover, the presence of the dicastery in these causes, in reality, is similar to that of necessary concurrent intervention.[21]

— *protected at least indirectly* by law, that is, they must not be situations deduced completely from the availability of public or private subjects, over which the authority has full discretion, such as with *public acts*, even if they are of ecclesial policy.[22]

In other words, one is a party not when one has mere capacity to submit the petition, but when there is the *fumus boni iuris* of the right *alicuius iuris subiectivi vel interesse legitimi, quod asseritur laesum.*

The concept of *legitimate interest* is foreign to canon law and is borrowed from Italian administrative doctrine. Therefore, it cannot be considered an endpoint that precludes possible extending or correcting remedies. In fact, the Apostolic Signatura (probably following the trail of an authorized doctrine[23]) has given this interest (protected at least indirectly by law) much broader contents than what a few years ago would have been imaginable. Thus, in a recent judgment on the elimination of a parish, this organ, assuming that *communitas paroecialis seu paroecia est ordinaria ecclesiastica structura, quae modo directo et proprio animarum curam offert et in ea quae dicta iura et munera exercentur* (cf.

19. Cf. Signatura, C. CASTILLO LARA, November 21, 1987, no. 7 *sub* c, cit.
20. Cf. Z. GROCHOLEWSKI, "La parte resistente...," cit., pp. 474, 477ff.
21. Regarding this concept in Canon Law, cf. I. ZUANAZZI, "Le parti e l'intervento del terzo...," cit.
22. Cf. my work "Il ricorso gerarchico: procedura e decisione," in *La giustizia...*, cit., p. 90.
23. Cf. P. MONETA, "I soggetti nel giudizio amministrativo...," cit., p. 61–62 and 67; G. TONDI DELLA MURA, "Interessi diffusi e attività ecclesiastica," in *Il diritto alla difesa nell'ordinamento canonico* (Vatican City 1988), pp. 106–107.

cc. 515 § 1, 516 § 2, 519, 528, 529 § 2 *praesertim*), it concludes by stating that the parishioners "*negari nequit in casu verum legitimum interesse, quod naturam praesefert personalem, directam et actualem quodque lex necessario tueri debet praesertim quum paroecia est in periculo suppressionis .... Huiusmodi rite perpenso interesse seu bono, retineri debet suppressionem paroeciae esse actum qui iuridice atque multopere tangit vitam communitatis paroecialis et singulorum membrorum paroeciae.*"[24]

Therefore, canon law does not expressly recognize for each individual faithful any right to challenge a decree of this type. It also does not admit that a real process of substance can be lodged regarding the legitimacy of the act. Instead, it limits itself to requiring, for the validity of the act, that the superior hear the opinion of the presbyteral council before pronouncing the decree, although he is not bound by this opinion, even if it is unanimous. However, the Signatura affirms that each of the faithful has a right to action and consequently an interest to act in a process and, therefore, standing for the process and to be a party.

This means that juridical relevance is recognized as a juridically protected interest, not only of the collective interests, but also those that in Italian administrative doctrine are called mere *diffusive interests*. In fact, if among the former, there are "interests that belong to a complete category of persons or, to be more precise, that are attributable to collectivities organized to pursue the interests of the category to which they belong," the latter—the *diffusive interests*—are not even "assessed based on the preexistence of juridical relationships regarding the good, and refer not to the subject as an individual, but to a member of a collectivity that is more or less broad, which nonetheless coincides with the majority" of the faithful.[25]

24. Signatura, *Chicagien.*, C. FAGIOLO, June 20, 1992, no. 7, cit.
25. P. MONETA, "I soggetti nel giudizio amministrativo...," cit., p. 62.

CAPUT I
De actore et de parte conventa

CHAPTER I
The Plaintiff and the Respondent

1476 **Quilibet, sive baptizatus sive non baptizatus, potest in iudicio agere; pars autem legitime conventa respondere debet.**

Any person, baptized or unbaptized, can plead before a court. A person who is lawfully summoned must respond.

SOURCES: c. 1646; SCHO Resp., 27 ian. 1928 (*AAS* 20 [1928] 75); *PrM* 35 § 3; PCIDSVC Resp., 8 ian. 1973 (*AAS* 65 [1973] 59); Signatura Decl., 31 oct. 1977

CROSS-REFERENCES: cc. 96, 221 § 1

COMMENTARY

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The norm of this canon is innovative with respect to the preceding legislation, which provided: *quilibet potest in iudicio agere, nisi a sacris canonibus prohibeatur; reus autem conventus respondere debet.* The substantive change is in the abrogation of the phrase *nisi a sacris canonibus prohibeatur.* The second part of the canon has remained the same since the decree of Gratian, apart from the semantic substitution of *reus* with *pars conventa,* which is applied throughout *De processibus* to avoid terminology that has a negative meaning in common language.[1]

1. Cf. *Comm.* 10 (1978), p. 265.

In the *CIC*/1917, the phrase *nisi a sacris canonibus prohibeatur* found specific application in the area of *accusatio matrimonii* for anyone who had been the direct and willful cause of nullity of marriage (c. 1971 *CIC*/1917), regarding the performance of legitimate ecclesiastical acts by persons who had been punished with incapacity to perform them due to incurring criminal penalties (cc. 2294 § 2, 2315, 2350 § 2, 2357 § 2 *CIC*/1917), especially c. 87 *CIC*/1917. On the basis of this norm, the right to action was denied not to unbaptized persons but to baptized persons who presented *obex, ecclesiasticae communionis vinculum impediens, vel lata ab Ecclesia censura.*

On the other hand, the respondent was a party, who, whether or not he or she had received baptism, had the right to be in the process and act. Therefore, there could not be—*ex paritate rationum*—reasons to deny that *existentially* the same persons could be plaintiffs. Consequently, the law did not deny the right to be a party, but only the exercise of that right in a specific case. Notwithstanding the abrogation of the phrase *nisi a sacris canonibus prohibeatur,* this same right must be considered to remain in effect, with the proviso that cc. 96 (*nisi obstet lata legitime sanctio*) and 221 § 1 (the rights are claimed *ad norman iuris*) be complied with.

Under the *CIC*/1917, the inconsistency between the norm and its application[2] was such that, from the beginning of the revision process, the Commission established the principle "*etiam non baptizatus potest esse actor ... Si infidelis petat ministerium iudicis ecclesiastici, admitti debet ad causam agendam. Quod a fortiori valet relate ad acatholicos baptizatos.*"[3] There has been resistance to this formulation, especially in connection with the fact that unbaptized persons and non-Catholics *non subiacent iurisdictioni ecclesiasticae nisi indirecte* and would ignore any unfavorable decision of the tribunals. Nonetheless, the norm remained in the definitive text "*attenta responsione Pontificiae Commissionis Decretis Concilii Vaticani II interpretandis diei January 8, 1973 (AAS 65, 1973, 59) ubi non baptizatis agnoscitur ius accusandi matrimonium apud Tribunalia ecclesiastica.*"[4]

Therefore, legal capacity in canon law is not a consequence of baptism. It proceeds from the fact of being a person. The Church's concept of *person* is not limited to whoever has been born, but also to one who has only been *conceived,* as evidenced in c. 1398, which defines the crime of abortion. From this norm, it can be concluded that whoever has been

2. "Praesens disciplina, qua ii admittuntur ex venia alicuius Dicasterii, quasi personalitas iuridica ipsis donaretur ad tempus, intra schemata iuris difficulter recipi potest," as the Code Commission emphasized, cf. *Comm.* 2 (1970), p. 185.

3. Cf. *Comm.* 2 (1970), p. 185; 8 (1976), p. 186.

4. *Comm.* 10 (1978), p. 265.

conceived may at least assert the right to life and, consequently, the right that nothing be done to consciously prevent one's birth.[5]

After the concepts of juridical capacity and standing are clarified (see introduction to the title "The Parties in the Case"), the remaining canons of this title discuss capacity to act (cc. 1477–1480) and the *postulatio processualis* (cc. 1481–1490).[6]

5. Cf., for the former norms, also F. ROBERTI, *De processibus* (Rome 1956), I, p. 511, which nevertheless supports its conclusions using the now abrogated norms of the Italian civil code.

6. For the problem of a terminology in Church law that changes from author to author, cf. above all the fundamental work of R. FIGUEROA, *La "persona standi in iudicio" en la legislación eclesiástica* (Rome 1971).

1477 Licet actor vel pars conventa procuratorem vel advocatum constituerit, semper tamen tenetur in iudicio ipsemet adesse ad praescriptum iuris vel iudicis.

Even though the plaintiff or the respondent has appointed a procurator or advocate, each is always bound to be present in person at the trial when the law or the judge so prescribes.

SOURCES: c. 1647; *PrM* 45

CROSS-REFERENCES: cc. 1452, 1530, 1696

COMMENTARY

Carlo Gullo

Capacity to act and the "ius postulandi"

This canon is identical to c. 1647 of the *CIC*/1917, except for the substitution of *pars* for *reus*. Therefore, the norm must be interpreted, according to c. 6 § 2, *ratione etiam canonicae traditionis habita*. The meaning seems clear and has not given rise to any interpretation problems[1]: the law expressly declares that, even if parties have appointed their own procurator or advocate, they are still obligated to be personally present when the law so provides or the judge so orders.

The normative provision seems to have a public law dimension. Evidently, the plaintiff's claim is specified in the petition, and the *contradictio* of the respondent can be found in the response the citation. Therefore, it would be unnecessary for the parties to attend the trial personally. Nevertheless, the law deems that there are certain acts for which it is insufficient to refer to writings prepared by the parties or by others. These acts may call for appropriate statements from the parties (cf. c. 1530 in connection with c. 1696, and c. 1452), especially in matrimonial and criminal cases *in quibus factum iuridicum, de quo iudicandum est, sc. delictum, non solum dependet ab elemento obiectivo legis violatae seu iuris laesi, sed etiam ab elemento subiectivo doli aut culpae, et tum quoad factum tum quoad imputabilitatem vix cognosci et definiri iuste potest, quin reus iudicio praesens sistatur.*[2]

1. Cf. *Comm.* 10 (1978), p. 265.
2. F.X. WERNZ-P. VIDAL, *Ius Canonicum*, VI: *De processibus* (Rome 1949), p. 180; cf. M. CORONATA, *Institutiones iuris canonici*, III (Turin 1933), p. 79.

Therefore, although the law acknowledges the institution of marriage through a procurator (c. 1104), on the basis of c. 1676, the judge cannot *validate* the marriage or bring about a reconciliation between the spouses through the procurator or the advocate even if, within certain limits, the procedural law of the area so allows.

Neither the procurator nor the advocate can substitute for a party that has been cited *ad praeceptum iudicis* to be questioned (c. 1530).[3]

3. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, I (Rome 1950), p. 302.

1478 **§ 1. Minores et ii, qui rationis usu destituti sunt, stare in iudicio tantummodo possunt per eorum parentes aut tutores vel curatores, salvo praescripto § 3.**

§ 2. Si iudex existimet minorum iura esse in conflictu cum iuribus parentum vel tutorum vel curatorum, aut hos non satis tueri posse ipsorum iura, tunc stent in iudicio per tutorem vel curatorem a iudice datum.

§ 3. Sed in causis spiritualibus et cum spiritualibus conexis, si minores usum rationis assecuti sint, agere et respondere queunt sine parentum vel tutoris consensu, et quidem per se ipsi, si aetatem quattuordecim annorum expleverint; secus per curatorem a iudice constitutum.

§ 4. Bonis interdicti, et ii qui minus firmae mentis sunt, stare in iudicio per se ipsi possunt tantummodo ut de propriis delictis respondeant, aut ad praescriptum iudicis; in ceteris agere et respondere debent per suos curatores.

§ 1. Minors and those who lack the use of reason can stand before the court only through their parents, guardians or curators, subject to the provisions of § 3.

§ 2. If the judge considers that the rights of minors are in conflict with the rights of the parents, guardians or curators, or that these cannot sufficiently protect the rights of the minors, the minors are to stand before the court through a guardian or curator assigned by the judge.

§ 3. However, in cases concerning spiritual matters and matters linked with the spiritual, if the minors have the use of reason, they can plead and respond without the consent of parents or guardians; indeed, if they have completed their fourteenth year, they can stand before the court on their own behalf; otherwise, they do so through a curator appointed by the judge.

§ 4. Those barred from the administration of their goods and those of infirm mind can themselves stand before the court only to respond concerning their own offences, or by order of the judge. In other matters they must plead and respond through their curators.

SOURCES: § 1: c. 1648 § 1
§ 2: c. 1648 § 2
§ 3: c. 1648 § 3
§ 4: c. 1650

CROSS REFERENCES: cc. 97 § 2, 98 § 2, 99, 110, 208, 689 § 2, 1041,1°, 1044 § 2,2°, 1095,2°, 1135–1140, 1324 § 1,1°, 1345, 1401,1°, 1505 § 2,2°

COMMENTARY

Carlo Gullo

Incapacity to act: representation on the part of the incapacitated party

1. *Normative structure*

Paragraph 1 repeats § 1 of c. 1648 *CIC*/1917, adding at the end *salvo praescripto § 3.*

Paragraph 2 repeats § 2 of c. 1648 *CIC*/1917. The substitution of the phrase *aut ipsos tam longe distare a parentibus aut tutoribus vel curatoribus* with *aut hos non satis tueri posse ipsorum iura* has no substantial significance. Guardians or curators can be substituted not only when they come to live far away from the incompetent person, but also when they can no longer effectively exercise their function for any reason.

Paragraph 3 establishes two innovations of importance. The first of these contemplates the possibility that minors may act for themselves, *sine parentum ... consensu*, in spiritual matters and matters linked with the spiritual. The new norm substitutes *parentum* for *patris*, stressing one of the fundamental principles formulated by Vatican II (cf. *LG* 32; *GS* 49 and 61), the principle of equal dignity and responsibility of parents (c. 1135, which applies the more general principle of c. 208).

The other innovation has a fundamentally technical significance. The constitution, confirmation, substitution and revocation of the curator are no longer accomplished through an administrative act of the ordinary, but through an act of the judge, which is a judicial act challengeable, *si et quatenus*, through judicial channels.

Paragraph § 4 is an *ad literam* transcription of c. 1650 *CIC*/1917.

2. *Terminology*

a) *Who are the "minores"?*

The new law, amending c. 88 § 1 *CIC*/1917, provides that majority is reached when one turns eighteen years of age. Therefore, any persons who have not reached that age are *minors* according to the norm of the law.

b) *To whom does the phrase "rationis usu destituti" apply?*

Since it is a norm fully set forth in the former legislation, it must be interpreted taking into account canonical tradition. If this is so, the term must be considered a modern formulation of what the decree of Gratianus

described as *furiosus*[1] and the decretals as *amens.*[2] To this interpretation, doctrine has incorporated the *infantes*, persons who have not yet reached seven years of age.[3] All of these persons, pursuant to natural law, are incompetent to protect their own rights.[4]

Canon 97 § 2, the parallel of c. 88 § 3 *CIC*/1917, establishes that *minor, ante septennium ... censetur non sui compos, expleto autem septennio, usum rationis habere praesumitur.* Canon 99 provides that anyone who is habitually deprived of the use of reason *censetur non sui compos et infantibus assimilatur.* In this case, the adverb *habitu* does not add anything substantial, because it is evident that a curator cannot be granted for a person who is only *in actu* deprived of the use of reason because he or she is, for example, overcome by grave fear, hypnotized, under the effect of hallucinogens, or intoxicated. The appointment of a curator requires that the condition of incompetence have a certain stability.

c) *To whom does the phrase "minus firmae mentis" apply?*

From the wording of c. 1478 § 4, this phrase discusses subjects who are in a condition of less incompetence than those who *usu rationis sunt destituti*, since the law provides for the possibility that they may be personally present in the trial *ad praescriptum iudicis*. That is why on this point some speak of an incompetence that belongs more to positive law than to natural law.[5] This category cannot include persons who in some juridical systems are considered disqualified, in contrast to those who are subject to interdiction.[6] It does include "those that the current Code, according to the case, indicates as affected by *infirmitas psychica* (cc. 689 § 2, 1041,1°, 1044 § 2,2°) or by *infirmitas mentis* (c. 1741,2°); those who *gravi defectu discretionis iudicii laborant* (c. 1095,2°) or that *rationis usum imperfectum tantum habent* (cc. 1324 § 1,1°; 1345). Doctrine and jurisprudence often speak of *mente debiles*[7] or *dementes*, persons deprived of sufficient psychic maturity to be able to defend their own rights by themselves in the process[8]; those who are not in a condition to consider whether it is appropriate to adopt a given procedural position, which arguments to present to sustain one's position, or refute that of the

1. Cf. c. 3, q. 7, cc. 25–26; cf. also the *glossa ordinaria* of the decretals *X* IV, 1, 24, *ad v. "furiosus,"* in *Decretales Gregorii IX una cum glossis* (Leiden 1618), p. 1438.
2. Cf. *X* IV, 1, 24.
3. Cf. M. CORONATA, *Institutiones iuris canonici*, III (Turin 1933), p. 79.
4. Cf. C. STANKIEWICZ, decr., December 13, 1990, in *Quaderni Studio Rotale* 6 (1992), p. 77.
5. Cf. ibid.
6. Cf. A. VITALE, "In tema di rappresentanza degli incapaci nel diritto canonico," in *Il Diritto Ecclesiastico* (1961), I, p. 476.
7. Cf. G. RICCIARDI, "La costituzione del curatore processuale," in *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), p. 419.
8. Cf. J.J. GARCÍA FAÍLDE, *Nuevo derecho procesal canonico* (Salamanca 1984), pp. 36–37; C. RAGNI, decr., June 12, 1990, in *Quaderni Studio Rotale* 6 (1992), p. 69.

opposing party, appoint an advocate or another representative, *etc.*[9] According to the seriousness of their condition, the judge may allow these persons to be present at the trial without a curator.

d) *To whom does the phrase "bonis interdicti" apply?*

Notwithstanding the normative formulation, the legislator does not seem to have wanted c. 1478 § 4 to include persons who have suffered a civil interdiction. This is because, among other things, the person suffering an interdiction is incapable of understanding or forming an intent, and therefore cannot act alone in a trial, while c. 1478 § 4 expressly establishes the possibility that these persons may be present at the trial alone *ad praescriptum iudicis*, and even *ut de propriss delictis respondeant.* Since it is incomprehensible how someone who is completely incompetent can commit a crime or answer for crimes committed, the norm, at least on its immediate basis, is positive law.

In accordance with an authorized doctrine, it is more reasonable to maintain that the law in this case refers to those "suffering an interdiction of goods,"[10] persons who are considered *incompetent* in some civil systems due to excessive wastefulness. This would explain the comparison with the *minus firmae mentis*, persons who are not completely deprived of the capacity to understand and form an intent.

e) *Who are considered the parents?*

The term *parents* refers to the legitimate or illegitimate (cc. 1137–1140) father and mother, or the adoptive parents, substituting for the former (c. 110). This is because parents have the right and the duty to provide care for their children in physical, cultural, social (c. 1136), and juridical aspects.

f) *Who is the guardian?*

The guardian is the person appointed to substitute for incompetence and to represent a minor deprived of his or her parents (c. 98 § 2). A guardian may also be appointed to represent a minor when the interest of the minor is different than that of the parents, or when the parents are not in agreement.

g) *Who is the curator?*

The curator is a person designated by the competent authority to substitute for the full or partial incompetence of adult persons or minors over age fourteen, when their juridical situation is not protected by

9. Cf. Signatura, "Mutinen," C. SABATTANI, January 17, 1987, in *Monitor Ecclesiasticus* 113 (1988), p. 270, no. 8; C. STANKIEWICZ, decr., December 13, 1990, cit., p. 77.

10. Cf. J.J. GARCÍA FAÍLDE, *Nuevo derecho procesal...*, cit., p. 36; F.X. WERNZ–P. VIDAL, *Ius Canonicum*, VI: *De processibus* (Rome 1949), p. 181; M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, I (Rome 1950), p. 309.

parents or a guardian, or when there is a conflict of interests between the subject in question and the parents or guardian.

Canon 1478 § 1 expressly establishes the possible existence of a curator for minors *minores ... stare in iudicio tantummodo possunt per eorum ... curators.* Paragraph 2 expressly establishes the possibility that the rights of minors may be in conflict *cum iuribus ... curatorum* or that the curators may be unable to exercise their function effectively. Paragraph 3 provides the possibility that, in spiritual matters or matters linked with the spiritual, minors may be present at the trial alone *si usum rationis assecuti sint* and *si aetatem quattuordecim annorum expleverint; secus per curatorem a iudice constitutum.*

Therefore, a curator may be constituted only for minors enjoying the use of reason who have completed their fourteenth year. All of this is *excluding* spiritual matters and matters linked with the spiritual, in which they can act by themselves.

3. *The normative rationale*

The normative *rationale* seems clear and is to protect the weak in order to prevent unscrupulous persons from taking advantage of their limitations and difficulties.[11] The appointment of the curator is therefore an act performed *in favor* of the incompetent person, not an act of punishment (e.g. because one has refused to be subject to an expert opinion) or *against* the incompetent person.[12] Giving a curator to a competent person really means restricting his or her rights and even taking them away completely, with an obvious violation of the right to defend that person. This is why the devious use that has been made of US jurisprudence in recent decades cannot be admitted under any circumstances. This practice has been to establish these procedural figures for the purposes of *excluding* the respondent from the trial, appointing a curator for competent persons for the sole purpose of establishing fictitious procedural competencies, given that the minor—and *ex analogia* the incompetent person—comes to have the domicile or quasi-domicile of the guardian or of the curator (c. 105 § 1). Notice of the citation and of the judgment will be sent to this domicile (c. 1508). The party is prevented from having access to the proceedings, as well as the exercise of the right to appeal.

In view of the seriousness of the consequences of appointing a guardian or curator, they must be appointed only for persons who really need them.

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11. Cf. P.A. BONNET, "Minore (Diritto Canonico)," in *Enciclopedia Giuridica*, XX (Rome 1990), pp. 1–5.
12. Cf. Signatura, *Mutinen*, C. SABATTANI, January 17, 1987, cit., pp. 271–272; C. STANKIEWICZ, decr., December 13, 1990, cit., p. 79.

Therefore, the practice—even endorsed by decisions of the apostolic tribunals—of appointing a curator *ad cautelam* must be completed rejected, in that it is *contra ius* and also goes against logic.[13] In fact, it is not uncommon to read that the party, after the appointment of a curator "ad cautelam" "nullimode iura sua ... coarctata habuit ... . E contra roborata quidem; curator etenim eaedem iura *defendit* deque iis cavet."[14] Moreover, this, perhaps, after having stressed that the incompetent parties "haud possunt nec convenire nec conveniri ... sed convenire et conveniri possunt tantum eorum curatores vel tutores."[15] The case is that these decisions find their explanation in fundamental errors, that is, in the fact that the curator is considered a help for the party, and that the curator is believed to be a person who compensates for the "incapacitas postulandi" of the subject, while on the contrary, the curator is appointed to substitute for the *inability to act* of the same subject. *That is, the curator represents, not assists the party.*[16]

Certain statements and the rationale that support them literally cause confusion. For example, in one of these decisions, one reads: "In dubio positivo et probabili de partis capacitate processuali, ad vitandas controversias circa sententiae validitatem constitui potest *curator ad cautelam.*

"Hoc in casu acta iudicialia denuntiari possunt parti, sed debent semper et denuntiari etiam curatori qui partem legitime substituit in processu. *Nihil prohibet quominus curator, ad cautelam datus, agat in iudicio collatis consiliis cum parte curata.*"[17] That is simply unbelievable! An incompetent person giving advice to the curator! Moreover, what would happen if the party and the curator do not agree? Which of the two wills prevails? Perhaps a curator should be appointed who is in agreement with what the party wants? Then what would be the point of appointing a curator for the party? In fact, the appointment of a curator *ad cautelam* constitutes only a mistake and not a measure to guarantee the validity of the procedural acts.[18] This is because if a curator is given to a person who has no need for a curator, thereby excluding the party from the process, the process is invalid: "Sententiam affici vitio nullitatis insanabilis ob defectum legitimi mandati, si in casu concreto constaret Ordinarium loci vel

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13. Cf. Signatura, *Mutinen*, C. SABATTANI, January 17, 1987, cit., pp. 271–272; C. POMPEDDA, April 8, 1974, in *SRR Dec* 66 (1974), pp. 267–268, no. 4.

14. Cf., for example, TRR, *Januen.*, C. CIVILI, decr., July 3, 1990, nos. 10–11 (unpublished); TRR, *Januen.*, C. FALTIN, decr., October 16, 1991, nos. 13–14 (unpublished).

15. TRR, *Januen.*, C. CIVILI, decr., July 3, 1990, no. 6 (unpublished).

16. For more light on this, cf. the decr., October 16, 1991, C. FALTIN, cit.: "curator eum (convenntum) adiuvit in colligendis probationibus ad defendenda eius iura adversus petitionem mulieris actricis et ita porro."

17. Cf. Signatura, *Mutinen.*, C. SABATTANI, January 17, 1987..., cit., no. 10, p. 271.

18. Such is the opinion of F. SALERNO, "In tema di interdizione cautelare e di rappresentanza dell'incapace per infermità di mente nel processo canonico," in *Il Diritto Ecclesiastico* (1965), II, p. 202.

Tribunal curatorem constituisse temerarie, festinanter, i.e. absque sufficienti praevia investigatione, absque dubio saltem probabili de defectu capacitatis conventae standi in iudicio."[19] The curator is not a figure "with limited power." Either the curator is necessary and should therefore by appointed, or the curator is not necessary and should therefore be absent.

Therefore, in view of the gravity of the consequences of appointing a guardian or a curator, the practice of many tribunals of appointing a curator in all cases on incompetence regardless of the current condition and the activity performed by the subject, as if it were a merely formal act, should be flatly rejected. The guardian and the curator should be appointed only in the event of a true necessity, with care, but also with absolute clarity.

Parents, guardians and curators substitute for the incompetence of minors and incompetent persons, if they cannot in fact act, because they are incompetent due to natural, psychopathological, or legal reasons, acting on their behalf and on their account.[20]

Therefore, it is a general rule that minors cannot act "sine consensus" of their parents or their guardian, except in the case of *spiritual matters or matters linked with the spiritual.*

Spiritual matters or matters linked with the spiritual are those matters over which the Church has proper and exclusive power (c. 1401,1°), that is, according to consolidated doctrine, matrimonial causes, causes on the sacred ordination, causes on religious profession, and also those concerning the benefits and rights of patronage[21] where they still exist. In any causes having this object, any minor who has use of reason and who is at least fourteen years of age can act on his or her own behalf. In all other cases, the minor needs the consent of his or her parents or guardian. Obtaining it is a *proceedability condition.* Therefore, the judge, before accepting the petition, must be certain (according to methods for obtaining said certainty, pursuant to law) of the existence of this consent (c. 1505 § 2,2°). Moreover, it must be valid consent, not obtained by threat, error or fraud.

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19. Cf. the clear affirmation made by Signatura, *Mutinen.*, C. SABATTANI, January 17, 1987, cit., no. 19 p. 276; cf. also C. GIANNECCHINI, May 21, 1982, in *SRR Dec* 74 (1982), pp. 272–274, no. 2; C. STANKIEWICZ, decr., December 13, 1990, cit., p. 79.

20. Cf. Signatura, *Mutinen.*, C. SABATTANI, January 17, 1987, cit., no. 8, p. 270; C. STANKIEWICZ, decr., December 13, 1990, cit., p. 78.

21. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, I (Rome 1950), p. 309, no. 6.

1479 **Quoties adest tutor aut curator ab auctoritate civili constitutus, idem potest a iudice ecclesiastico admitti, audito, si fieri potest, Episcopo dioecesano eius cui datus est; quod si non adsit aut non videatur admittendus, ipse iudex tutorem aut curatorem pro causa designabit.**

A guardian or curator appointed by a civil authority can be admitted by an ecclesiastical judge, after he has consulted, if possible, the diocesan bishop of the person to whom the guardian or curator has been given. If there is no such guardian or curator, or it is not seen fit to admit the one appointed, the judge is to appoint a guardian or curator for the case.

SOURCES: c. 1651; *PrM* 78 §§ 1 et 2; *CIC* Resp. II, 25 ian. 1943 (*AAS* 35 [1943] 58)

CROSS REFERENCES: cc. 98 § 2, 105, 128, 1478 § 1, 1519 § 1, 1521, 1620,5°

COMMENTARY

Carlo Gullo

1. *Appointment, change, and cessation of the office of tutor and of curator*

It is often said that legal interdiction does not exist in canon law.[1] In reality, while it is true is that canon law does not provide a proper discipline for this measure, it does not seem to exclude it through the reception in the proper state law systems that regulate the figure[2] in cases in which the diocesan bishop *iusta de causa per nominationem alius tutoris providendum aestimaverit* (c. 98 § 2).

Therefore, if there is no guardian given by state law and/or the ordinary wants to or must constitute a guardian, the ordinary will perform an administrative act. This act is challengeable by anyone having an interest, presumably before the Pontifical Council for the Family (*PB* 139), which will have not only the power to promote but also jurisdictional power.

1. Cf. G. RICCIARDI, "La costituzione del curatore processuale," in *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), pp. 416–417.

2. Cf. F. SALERNO, "Il procedimento canonico per la nomina del curatore dell'infermo di mente," in *Il Diritto Ecclesiastico* (1965), II, pp. 190–196.

This is not exceptional, since various Councils have actual jurisdictional power.[3]

If the civil authority has appointed a guardian, it is necessary to apply c. 1479. Consequently, the judge may admit him *audito, si fieri potest, Episcopo dioecesano eius cui datus est.* The *auditio* of the diocesan bishop is an administrative act that is a type of *counsel.* Although it is after the appointment of the guardian by the judge, this counsel is necessary to distinguish him as a legitimate person *standi in iudicio*, as well as for the resulting judicial *admission.* The judge is not obligated to follow the opinion of the bishop, but he is obligated to hear him whenever it is possible. If the counsel is requested after admission, or if it is concluded from previous judicial acts that the judge already pronounced regarding the appropriateness of changing or keeping the guardian provided by civil authority, the act is challengeable, because the very nature of the concept is upset, relegating the concept to a formality.[4]

In conclusion, a guardian cannot be admitted if the judge is uncertain whether the bishop of the minor has been heard, if it was possible to do so. The bishop to whose power the minor is subject is the bishop of his domicile or quasi-domicile (c. 105 § 1 and 3). The possible quasi-domicile acquired by a minor age fourteen or older or the domicile or quasi-domicile legitimately acquired by an emancipated person (c. 105 § 2) cannot be taken into account because the norm seems to presume the absence of a guardian.

If there is no guardian provided by civil law, or if it seems inappropriate to confirm a civilly appointed guardian, the ecclesiastical judge must arrange for the appointment of a guardian once he has received the petition, before admitting it. If a guardian had not been constituted either by the civil authority or by the ordinary, or if it is deemed inappropriate to admit the guardian appointed by the civil authority, *ipse iudex tutorem pro causa designabit* (c. 1479).

The judge competent to appoint the guardian is the sole judge or the presiding judge of a college of judges designated by the judicial vicar to handle the case.[5] Recourse can be lodged against the decision with the rotation of judges and eventually with the higher tribunal. This is because the appointment of a curator is relevant for the purposes of establishing or maintaining a valid procedural relationship and, consequently, a valid judgment. Since the judge's jurisdiction in connection with the subject is

3. For this problem, cf. T. MAURO, "I Consigli: finalità, organizzazione e natura," in *La Curia Romana nella Costituzione Apostolica Pastor Bonus* (Vatican City 1990), pp. 431 ff; S. BERLINGÒ, "Il Pontificio Consiglio per i Laici," in *La Curia Romana...*, cit., pp. 443ff.

4. Cf. *ex analogia*, Signatura, *Chicagien., Suppressionis paroeciae*, C. FAGIOLO, June 20, 1992, no. 8 (unpublished).

5. Cf. G. RICCIARDI, "La costituzione del curatore...," cit., pp. 429–430.

limited to the cause, the appointment of a guardian is valid only for that cause.[6]

The formal admission is a necessary act *ad validitatem*. Without it, the guardian or curator has no legitimate mandate, and the judgment issued will be null (c. 1620,5°).[7]

For the constitution, admission, and substitution of a curator, the same norms apply as in the case of a guardian, because it is possible to conclude from cc. 105 § 2 and 1478 § 1 that a curator may be appointed regardless of the need to file a case or to be called to trial.

The law does not state what requirements are necessary for the appointment of guardians or curators for minors or incompetent persons. It is reasonable that they must be of legal age, naturally capable, and not have lost the capacity to assert their own rights. They should be persons who can effectively exercise their functions because, for example, they have close emotional or familial ties to the minor or to the incompetent person. It would be preferable for them to belong to the same religion and be morally worthy persons.

The appointment is an *act of reception*. Therefore, it is necessary *ad validitatem* that the person designated to perform the office accepts it. Otherwise, one would have minors or incompetent persons to whom the appointment of a guardian or curator does not confer the status of *legitima persona standi in iudicio*, because they lack a legitimate mandate. It seems absurd to maintain that the position of those persons requiring this appointment also be accepted by the person for whom the guardian or curator is appointed. In fact, if a guardian or curator is given to a person because that person is incompetent, it is incomprehensible what juridical value there could be in having this person's acceptance. Nonetheless, the subject has the right to challenge this decree or to request its revocation, because everyone has the right to have one's competence acknowledged. Moreover, once they are legitimately constituted, guardians or curators may be revoked if the subject demonstrates that he or she has improved in a stable manner or has been cured.

Guardians and curators must be replaced in the case of death, disqualification, conflict of interests, or an inability to exercise their functions effectively, with the consequences established by law (c. 1519 § 1).

6. Ibid., p. 429.
7. Cf. F. SALERNO, "In tema di interdizione cautelare e di rappresentanza dell'incapace per infermità di mente nel processo canonico," in *Il Diritto Ecclesiastico* (1965), II, pp. 206ff; F. ROBERTI, *De processibus*, I (Rome 1956), pp. 521 and 523.

2. *Duties and powers of the tutor and of the curator*

Guardians and curators have the duty to exercise their mandate with the diligence of a good parent. Otherwise, they are subject to compensation for damages incurred. This is a consequence of the general principle of c. 128, by virtue of c. 98 § 2, which refers to civil law for matters involving the powers of the guardian, which by analogy can be extended to the duties of the guardians and curators. It is also an effect of c. 1521 (in the area of compensation for damages for having caused expiry due to inactivity), which does not seem to be an exception to c. 128, but an application of it.

Since guardians and curators substitute for the incompetent party, the party cannot act unless it is through these persons. Therefore, the guardian or curator appoints the advocate[8] and files challenges. According to some sources,[9] the curator or guardian may submit a request for separation, dissolution of a ratified and unconsummated marriage or a declaration of nullity of the bond.

8. Cf. Signatura, July 8, 1971, in *Periodica* 61 (1972), p. 139.
9. Cf. C. STANKIEWICZ, December 13, 1990, in *Quaderni Studio Rotale* 6 (1992), p. 78.

1480 **§ 1. Personae iuridicae in iudicio stant per suos legitimos repraesentantes.**

§ 2. In casu vero defectus vel neglegentiae repraesentantis, potest ipse Ordinarius per se vel per alium stare in iudicio nomine personarum iuridicarum, quae sub eius potestate sunt.

§ 1. Juridical persons stand before the court through their lawful representative.

§ 2. In the case where there is no representative or the representative is negligent, the Ordinary himself, either personally or through another, can stand before the court in the name of juridical persons subject to his authority.

SOURCES: § 1: c. 1649
§ 2: c. 1653 § 5

CROSS REFERENCES: cc. 115ff, 1419 § 2, 1505 § 2,2°, 1620,5°

COMMENTARY

Carlo Gullo

The capacity of juridical persons to act

The norm replaces cc. 1649, 1652 and 1653 *CIC*/1917. From the preparatory work, one can infer that the norm underwent considerable changes until it arrived at a clear solution.

Canon 86 § 1 of the 1978 *Schema de processibus* established by whom some juridical persons must be mentioned, namely, the cathedral church, the diocese, the bishop's mensa, the parish, and the seminary. For others, such as benefices and other collegial and non-collegial juridical persons, terms that are more generic were used.

The Commission, "attentis canonibus libri 'De populo Dei', ubi recensentur personae iuridicae et ipsarum repraesentantes determinantur,"[1] arrived at the formulation which became the text of the *CIc*. Therefore, to interpret this norm, one must refer to cc. 115 *et. seq.*

In the first place, one must ask to which juridical persons § 1 of c. 1480 refers. As inferred from the normative text and the work during its development, the juridical persons are private and public juridical persons, because the law does not make a distinction. They are present in the

1. *Comm.* 10 (1978), p. 267.

process through the representatives they have designated by universal or particular law or, in the absence of such law, according to the norms of the constitution, statutes, articles of incorporation, or decree of erection.

In the absence of a lawful representative, or if the representative is negligent in the performance of his or her duties, the law provides that the ordinary, either personally or through another person designated by him, may be present at the trial *nomine personarum iuridicarum, quae sub eius potestate sunt.* In this case, the ordinary, even when he himself is not a party, is considered as a *process substitute* and the judge, before admitting him to the trial, must confirm, *ad validitatem* (c. 1505 § 2,2° in connection with c. 1620,5°), if it is true that the juridical person in question is without a lawful representative or if the representative is truly negligent. Moreover, it is necessary to verify if the ordinary can be present at the trial, assuming the absence or negligence of the lawful representative, for both public and private juridical persons.

Despite some opinions to the contrary, it may be asserted that the canon refers only to *public* juridical persons. It is true that the norm makes no distinction; however, two arguments favor this interpretation. The first argument is *historical,* since during the preparatory work, it is evident that the juridical persons named were all public juridical persons. The second argument is based on the fact that the juridical persons named are under the power of the ordinary only in a very broad sense. It seems that the norm provides that the ordinary may *stare in iudicio* when he has the power of supervision over the juridical persons, such that he is capable of activating his responsibility because of inactivity. Nonetheless, it should be borne in mind that, according to the jurisprudence of the Signatura, in cases involving damages incurred in the performance of the duty of supervision, one will be unable to participate directly in the ordinary process. But, it will be necessary to have concluded the administrative trial, the judgment of which becomes a pretext for the petition for payment of damages, as the Signatura provided in its case: "controversiae ortae ex actu potestatis administrativae deferri non possunt ad tribunal ordinarium... ne ratione quidem refectionis damnorum... Absolute proinde incompetens dicendum est tribunal ordinarium ad cognoscenda damna ab Ordinario forte illata in exercendo munere vigilantiae super administratione bonorum ecclesiasticorum..."[2]

In these cases, when the ordinary is present at the trial on behalf of those juridical persons, the competence to handle the cause belongs to the higher tribunal (c. 1419 § 2), to avoid having the ordinary be the judge and a party at the same time or be judged by his own judicial vicar.

2. Signatura, *Brixien,* C. SILVESTRINI, June 30, 1990, no. 17, prot. 19889/88 CG, decided by the Plenary Committee (unpublished).

CAPUT II
De procuratoribus ad lites et advocatis

CHAPTER II
Procurators and Advocates

1481 § 1. **Pars libere potest advocatum et procuratorem sibi constituere; sed praeter casus in §§ 2 et 3 statutos, potest etiam per se ipsa agere et respondere, nisi iudex procuratoris vel advocati ministerium necessarium existimaverit.**

§ 2. **In iudicio poenali accusatus aut a se constitutum aut a iudice datum semper habere debet advocatum.**

§ 3. **In iudicio contentioso, si agatur de minoribus aut de iudicio in quo bonum publicum vertitur, exceptis causis matrimonialibus, iudex parti carenti defensorem ex officio constituat.**

§ 1. A party can freely appoint an advocate and procurator for him or herself. Apart from the cases stated in §§ 2 and 3, however, a party can plead and respond personally, unless the judge considers the services of a procurator or advocate to be necessary.

§ 2. In a penal trial the accused must always have an advocate, either appointed personally or allocated by the judge.

§ 3. In a contentious trial which concerns minors or the public good, the judge is ex officio to appoint a legal representative for a party who lacks one; matrimonial cases are excepted.

SOURCES: § 1: c. 1655 § 3; *PrM* 43 § 1, 44 § 1
§ 2: c. 1655 § 1
§ 3: c. 1655 § 2

CROSS REFERENCES: cc. 7–8, 10, 15 § 1, 124, 1453, 1598

COMMENTARY

Carlo Gullo

The "postulatio processualis"

1. It is a general principle that a party may act alone in a trial (c. 1481 § 1), except as provided in §§ 2 and 3 of c. 1481. This provision is an application of the principle that freely acknowledges for the competent party the *ius postulandi,* and thus the right to personally perform "any lawful acts allowing real and concrete judicial protection, until the judgment on the main issue is reached."[1] Consequently, under no circumstances can it be said that a right to defense has been violated because the judge has not allocated a defender for a party who, in exercising the right to act alone in the trial, has not designated one.[2]

The *ius postulandi* has as its logical presupposition the *capacitas postulandi.*

Since ignorance of the law is not presumed (c. 15 § 1), but the law is deemed to be known after promulgation (cc. 7–8), any party who decides to be personally present at the trial does so at his or own risk. The fact that a party who has decided to defend him or herself is ignorant of procedural laws does not constitute a violation of the right to defense.[3] This is because what is solely attributable to the negligence of the party cannot be considered a violation of the right to defense.[4] Concerning the methods for challenge, the law only requires that the judges clearly indicate them in the notification of decisions, which leads to the assumption that ignorance of the law is important only in this regard.

Therefore, the law does not protect a person who had done nothing, despite ability to appoint his or her own advocate or request free legal aid.[5] The legislator has not sought to ensure for a party a defense full of leniency with respect to any possible preclusions caused by his or her own negligence,[6] unless the judge (either maliciously or ignorantly) has led the

1. J. LLOBELL, "Lo ius postulandi ed i patroni," in *Il processo matrimoniale canonico* (Vatican City 1988), p. 186.

2. Cf. C. ANNÉ, February 1, 1964, in *SRR Dec* 56 (1964), pp. 75–76, no. 2; TRR, *Lausannen. Geneven. Friburgen.*, C. PINTO, January 13, 1984, no. 6 (unpublished); TRR, *Matriten.*, C. FALTIN, decr., May 25, 1987, no. 9 (unpublished).

3. Cf. TRR, *Matriten.*, C. FALTIN, decr., May 25, 1987, no. 9 (unpublished).

4. Cf. TRR, *Bronsvillen.*, C. AGUSTONI, decr., November 7, 1986, no. 4; TRR, *Dallasen.*, C. BRUNO, decr., July 3, 1987, no. 2 (both unpublished).

5. Cf. TRR, *Neo-Eboracen.*, C. STANKIEWICZ, decr., November 22, 1984, nos. 6–7; *Matriten.*, C. FALTIN, decr., May 25, 1987, no. 9/d (both unpublished).

6. Cf. C. GIANNECCHINI, decr., March 26, 1987, in *Monitor Ecclesiasticus* 113 (1988), p. 309, no. 2.

party into error, for example, by not stating that a decision may be challenged through ordinary means, such as appeal (c. 1614), or by denying that a decision can be challenged when it can.[7] Acting in this way does not mean remaining silent when faced with negligence by a party; instead, it manifests disdain for the law and the persons who turn to ecclesiastical tribunals.

Since canon law tends to favor substance over form, the assumption of knowledge of the law is never extended as much as it comes to be a *fictio iuris*. The legislator realizes that, barring cases in which a party is a legal expert, people do not possess special technical knowledge, especially of procedural norms. It is precisely to prevent the content of this general principle from becoming meaningless that law provides that, for certain acts of particular importance to the party, the subject should be told how to proceed.[8]

In short, if it is a general principle that one may be alone in a trial, in order to exercise this right (the *ius postulandi*), the party must request it and have it allowed. Given that the process in fact meets the needs of the public, the judge is not obligated to allow the party to represent him or herself, if he believes that the party is incapable of doing so, or if the party has demonstrated his or her inability to do so. In this case, to avoid nullity of acts or a waste of time (c. 1453), the judge may order the party to name a representative and/or an advocate, or impose one ex officio, especially in situations in which, should certain acts elude the knowledge of the party, the party will be incapable of defending him or herself (cf. e.g. c. 1598). Therefore, an ex officio appointment of an advocate by the judge follows a logic different from that underlying the grant of free legal aid, even if a court-appointed advocate is allocated. In the case of a request for free legal aid, a court-appointed advocate will be granted at the request of the interested party after a demonstration of indigence and the existence of the *fumus boni iuris*.[9]

A decree of allocation of the court-appointed advocate serves as a mandate[10] and cannot be challenged by the party to whom the advocate is assigned, since there is no obligation in this appointment. Moreover, the party continues to be at the trial personally, since the court-appointed advocate neither expels nor replaces the party. The other party also cannot challenge the allocation of a court-appointed advocate, unless he or she is objecting to the finding of indigence in the case of free legal aid. In fact,

7. Cf. TER Pedemontanum apellationis, *Ianuen.*, C. RICCIARDI, DECEMBER 17, 1992 (unpublished).

8. For example, at the notification of the sentence one must indicate the means and time limit that should be used in order to challenge it, cf. C. BURKE, November 16, 1989, in *SRR Dec* 81 (1989), p. 684, no. 9.

9. Cf. TRR, *Januen.*, C. CLEMENTI, decr., July 18, 1975, no. 13/a (unpublished).

10. Cf. J.J. GARCÍA FAÍLDE, *Nuevo Derecho Procesal Canónico* (Salamanca 1984), p. 41.

since a party receiving free legal aid is exempt from any order to pay costs, it is possible that there could be an obligation for the other party.

If a party does not attempt to be present at the trial alone (or is incapable of such), he or she has the right, under the limits established by law) to name any advocate and/or procurator allowed to exercise legal representation before the tribunals. If the judge refuses to admit this representative, it is a clear violation of the party's right to defense, with the resulting nullity of the judgment.[11] The party's *capacitas postulandi* and the corresponding right to defend oneself personally in a trial do not constitute a *fictio iuris*. Therefore, it must yield to the truth and not become an obligation that one is unable to meet. The judge may not ride roughshod over the party's desire to be defended by an advocate, if the party, who is the sole judge of his or her own interests, recognizes that he or she is not capable of acting alone.

The procurator has a representative function: "He acts in the process on behalf of the party. The procurator is, in short, an *alter ego* of the party in whose name and for whom he presents written documents to the tribunal with the petitions, receives notifications, etc. ... The function of the *advocate*, on the other hand, consists of giving technical assistance and advice, examining and drawing up the different documents, undertaking the oral and written defense, and preparing the evidence, all of which might be described as juridical assessment work."[12]

The law describes several types of advocates. There are advocates of the Holy See, who are elected by the Holy See to defend it within the Church as well as in litigation with states, and advocates of the Roman Curia, who are qualified to defend administrative cases before the *Sectio Altera* of the Signatura (cf. *PB* 83–85; motu proprio *Iusti iudicis*).[13] There are also advocates of the Rota, whose appointment, discipline, and competence are regulated by the particular law (*NSRR*, arts. 47–49) of the Rota. Therefore, cc. 1481 *et. seq.* solely concern advocates who exercise their function before the lower tribunals.

2. Paragraph 2 of this norm establishes the obligatory presence of an advocate, established by the party or allocated by the judge, in penal causes. One might wonder if the absence of an advocate causes nullity of the judgment. Taking into account the provisions of cc. 10 and 124, the answer seems to be no, although it is possible, for the purpose of compensation of damages, to establish the hypothesis of the liability of a judge who has not allocated an advocate.

11. Cf. C. DE JORIO, November 23, 1966, in *SRR Dec* 58 (1966), pp. 843–844, no. 7.
12. C. DE DIEGO LORA, commentary on c. 1482, in *Pamplona Com.*
13. For these figures, cf. my work "Gli avvocati," in *La Curia Romana nella Cost. Ap. Pastor Bonus* (Vatican City 1990), pp. 531ff.

3. Lastly, § 3 establishes that, except in matrimonial causes, the judge must allocate a court-appointed advocate for any party who does not have one in causes concerning minors or affecting the public good. However, this obligation does not seem to involve possible nullity of the acts and/or the judgment in the event that the judge does not allocate one.

1482 **§ 1. Unicum sibi quisque potest constituere procuratorem, qui nequit alium sibimet substituere, nisi expressa facultas eidem facta fuerit.**

§ 2. Quod si tamen, iusta causa suadente, plures ab eodem constituantur, hi ita designentur, ut detur inter ipsos locus praeventioni.

§ 3. Advocati autem plures simul constitui queunt.

§ 1. A person can appoint only one procurator; the latter cannot appoint a substitute, unless this faculty has been expressly conceded.

§ 2. If, however, the same person has for a just reason appointed several procurators, these are to be so designated that the first to act excludes the others.

§ 3. Several advocates can, however, be appointed together.

SOURCES: § 1: c. 1656 § 1; *PrM* 47 § 1
§ 2: c. 1656 § 2; *PrM* 47 § 2
§ 3: c. 1656 § 3; *PrM* 47 § 3

CROSS-REFERENCES: c. 1488 § 1

COMMENTARY

Carlo Gullo

Since the procurator is the *alter ego* of the party, who creates procedural responsibilities for the party he represents as if the latter spoke directly, the law provides that the procurator be identified precisely. Therefore, § 1 establishes a prohibition on the procurator naming a substitute without prior authorization from the party. When, for a just cause, more than one procurator is indicated, the only one recognized as a representative of the party is the first one to act (§ 2).[1]

In contrast, the function of the advocate is to assist and defend. Therefore, the law allows that someone may be defended by more than one advocate (§ 3), through mandates conferred by the party separately or jointly, or by indirect authorization to the advocate to associate with another advocate. The only limitation of a public nature applicable to this

1. Cf. C. DE DIEGO-LORA, commentary on c. 1482, *Pamplona Com.*

faculty is the prohibition on defrauding, through this measure, the norm that prevents and punishes the charging of excessive fees (c. 1488 § 1).

Lastly, the functions of the procurator and advocate undoubtedly can be combined in the same person. This faculty was established expressly in the draft revisions of the *CIC*, but it was eliminated as unnecessary, since no legal norm prohibits the combining of both functions.[2]

However, confusion arises when the functions of curator and advocate are combined, as is common in our tribunals. This is because the curator may appoint and revoke the advocate if he is dissatisfied with the way he is defending the party. Therefore, there could be conflicts of interest between subjects performing these two functions, and it is inadvisable to combine them.

2. Cf. *Comm.* 10 (1978), p. 269.

1483 **Procurator et advocatus esse debent aetate maiores et bonae famae; advocatus debet praeterea esse catholicus, nisi Episcopus dioecesanus aliter permittat, et doctor in iure canonico, vel alioquin vere peritus et ab eodem Episcopo approbatus.**

The procurator and advocate must have attained their majority and be of good repute. The advocate is also to be a Catholic unless the diocesan bishop permits otherwise, a doctor in canon law or otherwise truly skilled, and approved by the same bishop.

SOURCES: cc. 1657 §§ 1 et 2, 1658 §§ 1 et 2; Signatura Decl., 15 dec. 1923 (*AAS* 16 [1924] 105); *PrM* 48 §§ 1, 2 et 4

CROSS REFERENCES: cc. 208, 1488 § 1, 1620,6°

COMMENTARY

Carlo Gullo

Requirements of the procurator and of the advocate

This norm establishes the requirements for admission as a procurator or advocate before the lower ecclesiastical courts.

According to law, these persons must have attained majority and be of good repute, therefore, they must have reached age eighteen and enjoy a good reputation. Thus, admission as a procurator or advocate in a lower ecclesiastical court does not require extraordinary integrity in christian life or active participation in the life of the ecclesial community, both of which are requirements for advocates of the Roman Curia according to the Motu proprio *Iusti iudicis* (Art. 3 *sub* 1).

Moreover, advocates must be Catholic, unless the ordinary makes an exception *ad casum* due to particular circumstances. One's sex is not of any importance, because in this case there are no reasons to establish exceptions to the fundamental principle of equality (cf. *GS* 29) among the faithful (c. 208).[1]

He or she must also be "a doctor in canon law or otherwise truly skilled in canon law." Although in practice, the practice of admitting advocates with only a college degree is tolerated due to necessity, it does not seem to be allowed if the person is not truly versed in canon law, which

1. Cf. *Comm.* 2 (1970), p. 185.

can be deduced from the fact that he or she teaches in state or ecclesiastical universities, or at least in seminaries, or from the fact that—after having received the degree—has attended, passing the annual examinations, the Rota course or other courses that may be recognized as qualified to confer a diploma.[2]

The ordinary or the moderator of the curia must approve advocates. As an exception, they may be approved *ad casum*. Advocates of the Rota do not need approval, because they are assumed to fulfill all these requirements.

Lastly, admission to the practice of the profession, as may be deduced from c. 1488 § 1 and Art. 47 *NSRR*, is manifested by registration on the list, which does not imply acknowledgment of a form of self-government for professionals qualified to practice law. In fact, in the canonical system, there is no bar association even at a local level. Attempts to establish one always have been met by the ecclesiastical authority's refusal to acknowledge them. The last attempt before the Apostolic Signatura in 1972 probably failed because professional associations have autonomy of management recognized by law, especially with respect to discipline, which to a certain extent involves power of jurisdiction. This is denied in canon law for laypersons, the most numerous members of the legal profession, at least in Italy. It would be appropriate, for a variety of reasons, for the ecclesiastical authority to reconsider the solution at present, since the new Code, to a greater or lesser extent, recognizes this power of jurisdiction for the laity.[3]

In any event, to avoid an overly long process when the advocate neither resides in nor is registered on the list of the local tribunal, it would be appropriate for the judge to attempt to have the party designate a local procurator. The reasoning behind *Norms of the Tribunal of the Sacred Roman Rota* 48 § 3, which seeks to have the procurators before the Rota *Urben continenter incolunt*, seems valid for any tribunal.

Registration on the listor at least approval *ad casum*, are necessary and constitutive acts. One is not an advocate because one has passed the examination that grants the Rota diploma or because one is of legal age, of good reputation, a doctor or truly versed in canon law. Besides meeting those requirements, it is necessary to request admission, to be admitted on the lists of the various tribunals (Rota or lower tribunals), and to in fact be registered, when the mandate is presented, as well as throughout the entire period that the mandate lasts. This is a guarantee of public order. The ecclesiastical authority, through the list of advocates, provides a

2. For example, the Pont. Gregorian Univ. offers courses leading to a degree in jurisprudence.

3. Cf. R. FUNGHINI, "I laici nell'attività giudiziaria della Chiesa," in *I laici nel diritto della Chiesa* (Vatican City 1987), pp. 114ff; S. BERLINGÒ, "Il Pontificio Consiglio per i Laici," in *La Curia Romana nella Costituzione Apostolica Pastor Bonus* (Vatican City 1990), pp. 443ff.

guarantee for the faithful who turn to the justice of the Church against any abusive practice of the legal profession by persons who, taking advantage of the good faith of the faithful, pass themselves off as advocates. The existence of a professional list, which is easily accessible, also allows people who are not careful from being defrauded. If there is no approval *ad casum*, failure to be registered on the list—which is almost always due to unacceptable reasons of fiscal ambush, with which the ecclesiastical public authority cannot connive nor approve—constitutes a certain element for configuring the case of an absence of a *legitimate* mandate, that is, a mandate conferred on a person who is suitable to perform the function, with the consequences foreseen by law regarding nullity of the judgment (c. 1620,6°).

1484 **§ 1. Procurator et advocatus antequam munus suscipiant, mandatum authenticum apud tribunal deponere debent.**

§ 2. Ad iuris tamen extinctionem impediendam iudex potest procuratorem admittere etiam non exhibito mandato, praestita, si res ferat, idonea cautione; actus autem qualibet vi caret, si intra terminum peremptorium a iudice statuendum, procurator mandatum rite non exhibeat.

§ 1. Before undertaking their office, the procurator and the advocate must deposit an authentic mandate with the tribunal.

§ 2. To prevent the extinction of a right, however, the judge can admit a procurator even though a mandate has not been presented; in an appropriate case, a suitable guarantee is to be given. However, the act lacks all force if the procurator does not present a mandate within the peremptory time–limit to be prescribed by the judge.

SOURCES: § 1: cc. 1659 § 1, 1661; *PrM* 49 §§ 1 et 4, 60
§ 2: *SN* can. 177

CROSS-REFERENCES: cc. 482, 535

COMMENTARY

Carlo Gullo

Juridical nature and form of the mandate; admission without mandate in the case of urgency

1. This norm regulates conferral of the mandate, although it does not specify who must confer it and what its scope is, unlike the draft revisions of the *CIC*.

It seems fairly certain that the attribution of a mandate takes the form of a contract for services, with the consequent rights and duties typical of every contract (on the one hand, for the most insignificant proper right to be diligently protected; on the other, to be compensated with legitimate fees).

Paragraph 1 establishes that the procurator and the advocate, before beginning to perform their office, must submit to the tribunal an authentic mandate, which must have been accepted with the proper formalities.

Although c. 1659 *CIC*/1917 established that the advocate could not be admitted to perform the functions without first presenting *speciale mandatum ad lites scriptum*, jurisprudence affirmed that it was unnecessary for this act to be performed in writing. It was sufficient for the party to ratify it implicitly through his or her conduct.[1] This interpretation seems unacceptable, since it is unclear how and by whom the authenticity of a mandate can be certified, as the law requires, if the mandate is not conferred in writing.

The certification cannot be granted by layperson who is an advocate before the ecclesiastical tribunals, because a layperson has no power of certification. This always implies a power of *iurisdictio*,[2] which does not belong to the laity, or to the advocate, unlike in many systems (e.g., the Italian system), unless this power is not *expressly* recognized by law. Moreover, nothing prevents the law from recognizing this power. If laypersons can act as judges, if they have powers of decision within the PCL, it is unclear what prevents a certifying power from being expressly recognized on a more limited basis. However, certification of the authenticity of the mandate must result from an act of the competent ecclesiastical authority (the chancellor of the curia, the notary of the tribunal, the parish priest: cf. cc. 482, 535) or, according to one writer, by analogy, from a public official of the state (notary, official of the civil registry).[3]

The mandate can be conferred by the party (by any person who is legitimately in the trial on the party's behalf), or by the judge (by the judicial vicar). In the latter case, the decree of appointment takes the place of the mandate. However, although for a private party the issuance of a mandate, unless otherwise provided by law, is understood to be effective for all grades of the process,[4] this is not the case for the allocation of an advocate appointed by the judicial vicar, because each judicial vicar has jurisdiction only over his own tribunal. Only before the Roman Rota is the appointment of a representative appointed by the dean understood, if not stated otherwise, to be for all possible instances, including any incidents taking place before this tribunal.[5]

1. Cf. c. ANNÉ, November 8, 1963, in *SRR Dec* 55 (1963), pp. 761–762, no. 8, for a complete bibliography and study of the law regarding this point.
2. Cf. the essential work of G. GISMONDI, *Il potere certificativo della Chiesa nel diritto italiano* (Milan 1943), pp. 45–59; P.G. CARON, "Certificazione, II (Diritto canonico)," in *Enciclopedia giuridica*, VI (Rome 1988), pp. 1–7.
3. Cf. c. DE DIEGO-LORA, commentary on c. 1484, in *Pamplona Com.*
4. Cf. c. ROGERS, March 20, 1964, in *SRR Dec* 56 (1964), p. 242, no. 7.
5. Cf. TRR, *Rheginen.*, c. BRUNO, decr., April 19, 1991, no. 4 (unpublished).

1485 **Nisi speciale mandatum habuerit, procurator non potest valide renuntiare actioni, instantiae vel actis iudicialibus, nec transigere, pacisci, compromittere in arbitros et generatim ea agere pro quibus ius requirit mandatum speciale.**

Without a special mandate, a procurator cannot validly renounce an action, an instance or judicial acts, nor can a procurator settle an action, bargain, submit to arbitration, or in general do anything for which the law requires a special mandate.

SOURCES: c. 1662; *PrM* 50

CROSS-REFERENCES: cc. 1524–1525, 1713–1716

COMMENTARY

Carlo Gullo

The rationale for the norm is to protect the rights of the parties as thoroughly as possible. It is a reproduction of c. 1662 *CIC*/1917, except for the reference to the taking of an oath, because the oath no longer exists in the *CIC* as a specific proof.[1] Therefore, the norm is interpreted in accordance with c. 6 § 2, based on canonical tradition.

Even if a procurator represents and acts on behalf of a party, for acts that are more serious, the law requires an *ad hoc* mandate, a special mandate. The procurator (not merely the advocate) may validly waive an action, an instance, or judicial acts (cf. cc. 1524–1525)or perform a transaction, agreement, or arbitration settlement (cf. cc. 1713–1716) only if the party has expressly authorized him for it, thereby conferring a special mandate.

1. Cf. *Comm.* 10 (1978), p. 271.

1486 **§ 1. Ut procuratoris vel advocati remotio effectum sortiatur, necesse est ipsis intimetur, et, si lis iam contestata fuerit, iudex et adversa pars certiores facti sint de remotione.**

§ 2. Lata definitiva sententia, ius et officium appellandi, si mandans non renuat, procuratori manet.

§ 1. For the dismissal of a procurator or advocate to have effect, it must be notified to them and, if the joinder of the issue has taken place, the judge and the other party must be notified of the dismissal.

§ 2. When a definitive judgement has been given, the right and duty to appeal lie with the procurator, unless the mandating party refuses.

SOURCES: § 1: c. 1664 § 1; *PrM* 52 § 1
§ 2: c. 1664 § 2; *PrM* 52 § 2

CROSS REFERENCES: cc. 1519, 1620,6°

COMMENTARY

Carlo Gullo

Revocation of the mandate

This canon contemplates revocation of the mandate and the duty of the procurator to lodge an appeal.

Just as the appointment of a procurator and of an advocate arises from a mandate from a party or the judge, it may also cease because of revocation by the same party or judge, among other causes. For this revocation to be effective, the procurator or advocate must be notified. If there is a lawsuit pending a decision because the decree of the joinder of issue has already been issued, revocation must be made known to the judge and the other party, because the act entails suspension of the instance (c. 1519 § 1) until the party names a new procurator, or if the party is negligent, until the judge appoints one ex officio (c. 1519 § 2).

Just as the appointment must be in writing, revocation of the mandate must also be in writing. The law does not require that this revocation be accepted or include reasons. In the same way, notwithstanding the opposite practice in existence in the Roman Rota, it is unclear why a resignation from a mandate made by an advocate must be reasoned by the representative and accepted by the party.

The revocation and, by analogy, the resignation of a mandate entails *eo ipso* a revocation of the advocate with which the directly-chosen representative may have associated, with its legal ramifications (c. 1620,6°) in the event that the representative continued acting without a new mandate from the party.[1]

Paragraph 2 of this same norm sets forth *ad litteram* the content of § 2 of c. 1664 *CIC*/1917. It imposes on the procurator the duty to lodge an appeal against any definitive judgments burdening the client. The norm has its *rationale* in the fact that, because the terms of expiry for an appeal are brief, there may be insufficient time for a party and his or her procurator to consult and, after sufficient reflection, decide the best course of action.

The recent interpretation of this norm, compared to authorized doctrine,[2] jurisprudence of the Rota, extends this duty to the *prosecutio appellationis*.[3] This interpretation violates the principle of judicial economy. The procurator cannot be forced to initiate appeals proceedings (or to initiate them only to waive them later, provided the other party accepts the waiver) if, after having read the judgment, the procurator realizes that it cannot be challenged. This provision is required because, reasons of urgency and caution with regard to the appeal (which must be lodged within fifteen days) do not exist for the *prosecutio* (which can be lodged one month after the appeal). If this applies for the procurator with the trust of the party, it also would seem to apply *ex analogia* for the court-appointed procurator-advocate, who has no fiduciary relationship with the party, but only with the person who has appointed him or her.

Therefore, it seems unacceptable to maintain that, inasmuch as a mandate for the court-appointed advocate is conferred in the Rota by the dean and not by the party, if the advocate allows the terms for appeal to lapse, liability for this lack of action cannot be attributed to the party, and the lawsuit cannot be declared ended, because the party would not be in a position to personally assert his or her own rights.[4]

In the Rota, unless the tribunal allows the party to be personally present at the process, the advocate (including the court-appointed advocate) is at the same time the procurator, inasmuch as the procurator must be an advocate of the Rota and have a fixed residence in Rome. However, if there is no procurator, there is no problem, because the terms for appealing and pursuing the appeal run from the moment the party, not the advocate, is notified. If there is a procurator, no distinction can be made between the procurator with the trust of the party and the procurator appointed ex officio.

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1. For the problems regarding this question, cf. TRR, Rome, c. CLEMENTI, decr., January 18, 1978 (unpublished).
2. Cf. J.J. GARCÍA FAÍLDE, *Nuevo derecho procesal canónico* (Salamanca 1984), p. 41.
3. Cf. TRR, *Rheginen.*, c. BRUNO, decr., April 19, 1991, no. 5 (unpublished).
4. Cf. ibid., no. 7 c.

1487 **Tum procurator tum advocatus possunt a iudice, dato decreto, repelli sive ex officio sive ad instantiam partis, gravi tamen de causa.**

For a grave reason, the procurator and the advocate can be removed by a decree of the judge given either ex officio or at the request of the party.

SOURCES: c. 1663; *PrM* 51

CROSS REFERENCES: cc. 751, 220, 1085, 1488–1489

COMMENTARY

Carlo Gullo

Removal of the charge of procurator and of advocate

The norm establishes that, for a grave reason,[1] the procurator and advocate can be removed by the judge's decree ex officio or at the request of a party. Grave reasons include apostasy and the loss of a good reputation, living in concubinage or having attempted a civil marriage,[2] the imposition of disciplinary and/or penal measures, and petition for removal from the register of advocates. They would also include conduct involving systematic obstruction, defrauding justice, and contempt for law or the tribunal.[3] However, in the latter cases, the judge must proceed with the utmost sensitivity, in order to avoid running the risk that an attorney's obstructionist attitude could be confused with a judge's arrogance and to avoid violating and destroying a party's right to defense through intimidating attitudes towards the defender.

Since the norm makes no distinction, the advocate and the procurator that may be removed are those that have been appointed by a party, as well as those appointed ex officio. This revocation can be decreed *motu proprio* by the judge (with the resulting suspension of the process, possible right to appeal, etc.) or at the request of a party who has been given the advocate or procurator ex officio (e.g., due to damage incurred in the

1. The commission wanted to emphasize that there must be a matter of gravity involved, and not simply be a *just* case: cf. *Comm.* 10 (1978), p. 271.
2. Cf. R.L. BURKE, "Commentarium de responsione in casu particulari de inidoneitate advocatorum qui in unione irregulari vivunt ad patrocinium in causis nullitatis matrimonii exercendum," in *Periodica* 82 (1993), pp. 701–708; Signatura, decr. Congr., July 12, 1993, ibid., pp. 699–700.
3. Cf. TRR, *Rheginen.*, C. DE LANVERSIN, decr., February 16, 1994 (unpublished).

performance of one's office), and the opposing party (in the event of obvious obstructionism and defrauding of justice).

A judge abuses his power[4] when, without wanting to remove the advocate, he believes that he can threaten the party with archiving the cause if the party does not voluntarily revoke the mandate of the advocate-procurator.

4. Cf. TRR, *Florentina*, C. PINTO, decr., January 9, 1987 (unpublished).

1488 **§ 1. Vetatur uterque emere litem, aut sibi de immodico emolumento vel rei litigiosae parte vindicata pacisci. Quae si fecerint, nulla est pactio, et a iudice poterunt poena pecuniaria mulctari. Advocatus praeterea tum ab officio suspendi, tum etiam si recidivus sit, ab Episcopo, qui tribunali praeest, ex albo advocatorum expungi potest.**

§ 2. Eodem modo puniri possunt advocati et procuratores qui a competentibus tribunalibus causas, in fraudem legis, subtrahunt ut ab aliis favorabilius definiantur.

§ 1. Both the procurator and the advocate are forbidden to influence a suit by bribery, seek immoderate payment or bargain with the successful party for a share of the matter in dispute. If they do so, any such agreement is invalid and the judge can fine them. Moreover, the advocate can be suspended from office and, if this is not a first offence, can be removed from the register of advocates by the bishop in charge of the tribunal.

§ 2. The same sanctions can be imposed on advocates and procurators who fraudulently exploit the law by withdrawing cases from tribunals that are competent, so that they may be judged more favourably by other tribunals.

SOURCES: § 1: c. 1665; *PrM* 54,1°

CROSS REFERENCES: cc. 6 § 2, 1290, 1490, 1649

COMMENTARY

Carlo Gullo

Prohibitions and sanctions

Paragraph 1 of the norm is almost a literal reproduction of c. 1665 *CIC*/1917, except for the last subparagraph. Therefore, it can be interpreted, pursuant to c. 6 § 2, with reference to the doctrine of the period.

The law directly establishes three prohibitions: *a*) influencing a suit by bribery; *b*) bargaining for a share of the matter in dispute; and *c*) seeking immoderate payment, under penalty of nullity of any agreements violating them, and of economic sanctions, in addition to the possibility of suspension and, in the event of a repeat offense, removal from the register of advocates.

The *reason* for this threefold prohibition is obvious: to prevent the advocate from taking advantage of the client's difficulties to gain undue advantage. Let us consider each of the prohibitions in particular:

a) What does *emere litem* consist of? As the term expressly states, it prohibits the advocate from purchasing the lawsuit from the client; an advocate cannot negotiate payment to the client to take over the client's rights at the end of the cause. If the client turns to the advocate for assistance in claiming a fund for the sum of one hundred million, the advocate cannot negotiate with the client for payment to the client of the sum of ten million in exchange for the right to collect the hundred if the case is won.

b) Advocates are prohibited from negotiating for a share of the object of litigation. Therefore, an advocate cannot reach an agreement with a client stating that, if the case is won, the attorney will receive half of the fund the right to ownership of which is being claimed judicially.

c) Lastly, it is prohibited for the parties to be charged immoderate fees. Obviously, in order to speak of *excessive* fees, it is necessary for there to be a schedule establishing the fees, which the law requires of the ordinary (c. 1649) and, in some countries, of the bishops' conference.[1] Therefore, excessive fees are those higher than the fees established in those norms. However, from a substantive point of view, it is necessary for these norms to have some specific point of reference. This is because the Church, its tribunals and its advocates live in this world, a world with economic laws that the Church cannot ignore.

The most logical and just thing would be to relate the fixing of fees to the civil norms in force, which can be demanded—in accordance with c. 1290—because the advocate-client relationship can be classified as a contract for services. Obviously, the fees for an advocate working in Egypt, Poland or Brazil cannot equal those of an advocate working in the United States, England, or Italy, not because the quality or quantity of work is different, but because the economies and currency values are different. Establishing fees that do not take all this into account involves demagogy, with the consequence of making it impossible to apply the norm and exposing whoever is unable to apply it to complaints from dissatisfied clients.

However, it must be born in mind that privately retaining an advocate is a *luxury*, and luxuries must be paid for. The fact that it is a luxury makes it a general principle that parties can be present alone in a process. Moreover, law allows those who can afford the costs to be defended by a public advocate, who receives fees from the tribunal and therefore is not paid by the party (c. 1490), unless indirectly to a modest degree from the costs of the process. Parties that cannot bear the costs are granted free legal aid. Why then should a person who can pay fees that are fair in

1. For Italy, cf. General Decr. of the CBI, November 5, 1990, art. 57.

connection with established fees in the same territory for comparable civil cases[2] not pay them? What could the *reasoning* be?

Paragraph 2 of the canon is new and is intended to prevent the abuses that took place in the 1970s, when it was discovered that some advocates—obviously with the consent or due to ignorance of some tribunals—had diverted to Africa or to the United States Italian or Spanish causes that could not have been won before the competent courts.

The norm, while criticized by some,[3] establishes that procurators or advocates may be punished if they remove causes from competent tribunals in order to receive judgments that are more favorable. According to this norm, a person cannot be punished who—using multiple forums of competence provided by law—presents a cause before one of them, e.g., when the cause is presented in the forum of the plaintiff, or when the parties mutually agree to reverse the roles of plaintiff and respondent.

2. Cf. S. GHERRO, "Il diritto alla difesa nei processi matrimoniali canonici," in *Il diritto alla difesa nell'ordinamento canonico* (Vatican City 1988), pp. 15–16.
3. The objection was that the law could not codify the recognition of the existence of *more favourable* tribunals.

1489 **Advocati ac procuratores qui ob dona aut pollicitationes aut quamlibet aliam rationem suum officium prodiderint, a patrocinio exercendo suspendantur, et mulcta pecuniaria aliisve congruis poenis plectantur.**

Advocates and procurators who betray their office because of gifts or promises, or any other consideration, are to be suspended from the exercise of their profession, and are to be fined or punished with other suitable penalties.

SOURCES: c. 1666; *PrM* 54,2°

CROSS REFERENCES: cc. 1341ff

COMMENTARY

Carlo Gullo

The norm is a literal transposition of c. 1666 *CIC*/1917. Therefore, it can be interpreted according to the meaning of the old law. We would like to set forth Torre's interpretation, quoted by Noval: "Verba prodere officium ... intelliguntur ita de facto ex. gr. mentientes aut falsum in scripturis facientes, aut probationem efficacem vel statutum particulare et decisivum praetermittentes; et haec aut alia sive in favorem sive in praeiudicium clientis et tum ob dona aut pollicitationes tum absque illis idest ob quamlibet aliam rationem."[1]

In all these cases, the legislator establishes that advocates and procurators who have committed these offenses must be suspended from the practice of their office by the moderator of the tribunal, fined and punished with other appropriate sanctions.

1. Cf. J. TORRE, *Processus matrimonialis* (Neapoli 1956), p. 170.

1490 In unoquoque tribunali, quatenus fieri possit, stabiles patroni constituantur, ab ipso tribunali stipendium recipientes, qui munus advocati vel procuratoris in causis praesertim matrimonialibus pro partibns quae eos seligere malint, exerceant.

In each tribunal, as far as possible, permanent legal representatives are to be appointed, who receive a salary from the tribunal and who are to exercise the office of advocate and procurator, especially in matrimonial cases, for parties who may wish to choose them.

SOURCES: —

CROSS REFERENCES: c. 1481

COMMENTARY

Carlo Gullo

Permanent legal representatives

This canon is entirely new. It closes title IV, *De partibus in causa*, and regulates the establishment of the public advocate.

The establishment of the public advocate before the various tribunals *is* suggested, not imposed. This can be deduced from the phrase *quatenus fieri possit.* In fact, this office, while albeit widely used in some countries, is foreign to other juridical cultures (*e.g.*, the Italian system). On the other hand, the creation of this office became necessary due to the losses caused by the absence of a private legal sector in some countries, such as those of Eastern Europe during the Communist domination. Anyone with a minimum of juridical experience in the apostolic tribunals is aware that some causes reach the Roman Rota after an *iter* of twenty years, with the burden of four or five decisions and ending with a favorable result. These causes could have been decided much more quickly, with a positive result, if the parties had the opportunity to be guided by persons with technical competence in the collection of evidence and arguments. In practice, the lack of procedural equality (because one party who is ignorant of law was always opposed by another—the defender of the bond—having technical competence) kept judgments from being the result of equality in the assessment of evidence.

This office *is not an alternative* to the private legal profession. It operates together with it, as can be seen from the fact that these legal representatives act *pro partibus quae eos seligere malint.* Therefore, the right

of the parties to choose between a public and a private representative is retained.

In spite of the terminology used, the public advocate does not perform a public function, like the defender of the bond or the promoter of justice. Instead, the public advocate exercises an extremely private function, representing and/or defending the party.[2] However, there is no true fiduciary relationship between the party and the public representative. If, on the one hand, the party can choose the said representative, the public advocate still cannot reject the cause or be paid by the party, because the representative receives *ab ipso tribunali stipendium*. By being a part of the structure of the tribunal, the public advocate has a fiduciary relationship only with the tribunal.

If establishing this office is necessary, *stabiles patroni* must be established. The stability of the office is imposed to ensure for the representative a minimum of autonomy in the performance of his or her office with respect to the judicial vicar, to which the representative is subordinate from a disciplinary point of view, as are all the other members of the court staff. It is necessary to appoint more than one person, in order to safeguard the principle of equality. In fact, if one party could choose a public advocate and the other could not because there is only one, this latter party could feel that he or she has been prejudiced by the fact that the party's opponent has been defended by a person who belongs to the court staff.

2. Cf. TRR, *Clavaren.*, C. COLAGIOVANNI, decr., March 29, 1990, no. 6 (unpublished).

TITULUS V
De actionibus et exceptionibus

TITLE V
Actions and Exceptions

INTRODUCTION

Carmelo de Diego-Lora

I. ACTION AND LAW

1. *Introduction*

A previous commentary on this title stated: "The subject of the action is the central theme of procedural law and of every process."[1] This statement is still accurate. The action is the point at which the aspirations for justice, latent in material juridical norms, come together with the actual possibilities for achieving justice using the operative means of procedural law. This law provides legitimate channels for reaching just solutions to claims that interested parties present before tribunals and, when applicable, exceptions in opposition to the action presented by the subject against which the claim is directed.

In the process, there is a formal confrontation of interested subjects before the judicial organ, which arises out of a confrontation in juridical life. The judicial function is exercised by putting the organ of judicial power into the service of the claim of a physical or juridical person who believes he or she has been affected by an unjust situation, according to the demands of the system. Either due to resistance created in the confrontation or because the object cannot be obtained because of a legal provision, this power cannot be used. This requires that it be done through a judicial judgment. For the subject presenting a claim before a judge, it is presented as a situation of insoluble confrontation, which can be lawfully resolved only by a judgment.

1. *Pamplona Com*, pp. 896–897.

The action becomes the legitimate means that make it possible for a situation that has arisen in the relationship between men to become a formal confrontation, subject to procedural laws, which allows the function of justice in the Church. The first effect of the action is initiating the process, by invoking the authority exercising judicial power to pronounce a just judgment in the presence of all the interested parties, by applying canon law to the specific case. Formally, the action makes use of the favorable juridical appearance —the *fumus boni iuris*— for the process to begin. However, it is necessary for that appearance to be proven true, or the judgment will not be in favor of the party making the claim. After these considerations, the process comes to be a formal juridical instrument for a ruling on the action. The process is more than a process on whether the juridical appearance with which it is presented coincides, through appropriate verification and the organ of justice, with the juridical reality claimed. This means that action and right are conceptually different phenomena.

2. *Concept of procedural canonical action*

Canon 1491 makes the difference between action and right clear, when it states that every right is protected by an action. Canon 221 § 1 establishes the right of the faithful to claim the rights they have in the Church. However, the canon notes that *claiming* a right is not the same thing as *having* a right. A claim makes it possible for a right that one claims to have to be affirmed and corroborated by evidence before the competent authority of the Church. However, the Church, when pronouncing its judgment on a claim, may state that the claimant does not have the right he or she claims. The dichotomy between action and right is the origin of the doctrinal controversy arising in procedural law regarding the concept of action: whether it is autonomous from the concept of entitlement to the right claimed, or if, on the contrary, it is so closely related with it, and dependent thereon, that, if the judgment is not favorable for the action exercised, it can be said that the action did not exist. In this doctrinal context, the only thing that could exist would be a right to access to the tribunal of justice and, consequently, a right to the process and to judgment.

When one considers the autonomy of the concept of action dependent on and linked to the juridical-material reality, one may anticipate a concept approximating the action, because it is a procedural act: effective exercise, by legitimate means, through a formally formulated claim before an organ of judicial power, of the demands for justice latent in a confrontational situation, different from the procedural confrontation itself, which is transplanted to this latter confrontation on the initiative of the claimant. Therefore, the passive subject of the action will be anyone who,

in the confrontational situation before the process, has at least a virtual interest opposed to the interest formulated in the claim.

The actual exercise of the action corresponds to a juridical power belonging to a subject of the system, by which he or she can lawfully activate the process by petitioning the Church tribunals. This juridical power is called the *right to action.* It may be defined as the right to the legitimate protection provided by the canonical process, with the hope of a favorable judgment, because the interests of a subject of the system are confronted with the interests of another, at least virtually, in juridical situations, or actually with juridical consequences, which it devolves upon the Church to resolve, and which appear to the subject to be impossible to solve, either because of resistance from the party with the opposing interest, or because they are juridical matters that the subjects cannot lawfully handle.

3. *Historical precedents*

It is interesting to outline the evolution of the Roman concept of action: "The term *actio* as well as the verb *agere* possibly were used not so much in the general sense of 'deed' or 'doing something', but in the special sense of putting on a small dramatic function as in the theatre."[2] The initiative is of private origin, from the archaic period in Rome, although the participation of the magistrates came to stress the public interest in proper resolution of disputes, as well as vigilance in the compliance with the terms of the dispute. In the period of the procedure of the *legis actiones*, the parties made their statements before the magistrate, abiding by rigid forms, full of ritual solemnity. The slightest mistake entailed a loss of what was sought. Moreover, the number of the *legis actiones* was very limited. In the *in iure* phase, once the complaint was formulated, if the magistrate believed that the petition was worthy of consideration, the *litis contestatio* was formulated and the action was granted, with the plaintiff's petition and the defendant's exceptions established.[3] Once the judge to whom the parties would submit the issue was designated, in the *apud iudicem* phase, the evidence was presented. However, the content of the judgment was determined by the *actio* that the praetor granted.[4]

This system began to decline towards the second century B.C., and it was replaced by the formulaic procedure. Without the action being subject to the narrow limits or formal rigor of the *legis actiones*, a particular situation was considered and a formula was applied, so that, if the factual situation to which the juridical expression had been given was proven, the

2. V. ARANGIO-RUIZ, *Las acciones en el derecho privado romano* (Madrid 1945), note on p. 17.

3. Cf. A. D'ORS, *Elementos de Derecho privado romano* (Pamplona 1975), p. 68.

4. Cf. A. D'ORS, *Derecho privado romano* (Pamplona 1986), p. 155.

right existed. The right would be adapted to the circumstances of the case, and the praetor could grant action, if he found that a right deserved it, without the need for abiding by the five predetermined *legis actiones*.[5]

The concept of action is a result of the acceptance by Justinian of Celsus' definition, at the full height of the procedure of the *cognitio extra ordinem*, in which the parties turn directly to the judge, set forth their case, and present whatever evidence they find appropriate. The action becomes a generic way of asking for justice.[6] In the "Institutions" of Justinian, the concept is elaborated: *actio nihil aliud est quam ius persequendi iudicio quod sibi debetur.*[7]

4. *The debate over the concept of action*

The debate regarding action arose in German juridical doctrine in the mid-nineteenth century, under the historical school of law and Mütter's criticism of Windscheid's comments on Roman action. Savigny, for whom action is the same subjective right that is put into motion as a consequence of a violation, inspired Windscheid. Action is a reaction of the same right when violated. For Windscheid, action does not arise from a violation of the right, but from the power to impose that right through judicial means. However, what is significant to the process is the knowledge whether or not there is a right, not whether or not there is a right to act, to which a very widespread concept in the German field is opposed: the *Klage*, the right to complain, to demand juridical protection from the courts. With this, in accordance with his background in the Digest, he stressed the element of juridical protection of the right inherent to Celsus' concept of Roman action. On the other hand, the right to demand something from another is the *Anspruch*, the claim of the plaintiff, which required that there be a prior obligation.

In 1856, the work of Windscheid was published. In 1857, Müther, inspired by ideas from Hasse, published his monograph. In it, he considered action to be a right to juridical protection directed against the state, represented by its jurisdictional organs. The figure of the *Anspruch* branches off in two directions. On the one hand, it moves toward the state in a claim for jurisdictional protection. On the other, it moves toward the obligated party, demanding the performance of an act.

When Windscheid responds, admitting the right to act as a right against the state and in turn a right against the opponent, modern procedural law is generally understood to originate. Modern procedural law declares its autonomy from other legal systems that contemplate and

5. Cf. J. IGLESIAS, *Derecho romano* (Barcelona 1972), p. 185.
6. Cf. A. D'ORS, *Derecho privado romano*, cit., p. 169.
7. JUSTINIANO, *Instituciones*, 4, 5, pt.

regulate juridical-material relationships, after noting the distinction between procedural and substantive aspects in the same action, which appear in the entire process. The procedural action constitutes a topic that will be discussed by many jurists of the era, some of them notable figures in the science of law. A trend of opinion emerged, shared by prominent writers such as Von Bülow, Degenkold, and Plösz, who believe that the basis of action is outside of the process. It is the right to act in a process, as a subjective right independent of the actual achievement of a private right, which is granted to anyone who turns to the judge demanding a decision on a dispute. Therefore, the right to action is an abstract right that belongs to anyone who petitions the courts.

Wach was the main figure criticizing this position, denying that action could be reduced to a merely formal concept. For Wach, it is not a right against the state but against the opponent, who is obligated to bear the execution of the juridical defense rendered by the public authority. He maintains this thesis of the right to juridical protection. Although action is an autonomous right of a public nature, it constitutes a bridge to material juridical reality when deemed a means for the objective of the material right, even if it is not identified with the same right. It is sufficient for the person acting to have an actual interest in obtaining the protection and to assert it in a process. To Wach, the power to sue coincides with procedural standing. His doctrine demonstrates the autonomy of procedural law, as opposed to substantive law.

Chiovenda, in agreement with Wach, maintains the autonomous nature of the right to action, distinct from the private subjective right. But, for him, it is not a right against the state, but against the opponent. The public authority should be concerned with executing the law. Action is the juridical power to give life to the condition to carry out the specific will of the law. If action protects a material right, the obligation to satisfy it constitutes the content of this right, not of the action. Therefore, the judgment does not generate any new obligation; it grants new power to the winning party. When the judgment is executed, the obligation ceases, similar its cessation due to voluntary compliance. For Chiovenda, action is a juridical power, an expedient right—because it is used up in its exercise—to which the doctrine of optional rights is conceptually applied. With this doctrine, Chiovenda has reconciled action as a right to juridical protection and the proper subjective right.

The issue is not close to being settled. Subsequent procedural doctrine has continued to debate some of the previous doctrines, going so far as to remove the demands of justice latent in the substantive juridical system from the same procedural system, the latter being a mere formal vehicle for the former juridical substances, so that both systems remain uncontaminated, each with its own spheres of influence and reciprocal conditioning. Calamandrei, when referring to this debate, said: "although translated into technical procedural terms, there was really only one

problem in dispute: the relationships between individual interest and public interest, between citizen and State, between freedom and authority, which today surface in all fields of thought."[8]

Of what interest is this debate to the canonist? In spite of the environment in which this debate has occurred, and the concessions to juridical positivism presented by many of the positions taken, canon law develops and is applied in a juridical-social environment that prevents it from being totally isolated from the juridical concepts surrounding it. It is necessary to acknowledge the major concomitance and reciprocal influences that civil and canonical juridical procedural techniques have had historically. One sign of the interest in the debate on the nature of the law of action is the work of Roberti, as well as the bibliography on the subject.[9]

5. *Action in the CIC*

The *CIC* has given this title V the heading *De actionibus et exceptionibus*. It is divided into two chapters. The first includes five canons under the heading *De actionibus et exceptionibus in genere*, and the second has five canons under the heading *De actionibus et exceptionibus in specie*.

It should be noted that, despite the fact that actions and exceptions are always treated equally in the headings, only the first two canons refer to exceptions together with actions. The remaining eight canons do not discuss exceptions.

Canon 1491 has an identical concept of the action as well as the exception. Both defend the right, by which they have their own identity in connection with the *quod sibi debetur* of Celsus' definition, because they are not confused with the right itself nor are they the dynamic effect of the same right in view of a violation, although they have an intimate relationship to the right, with respect to which they function as armaments protecting it.

When cc. 1494 and 1495 mention counteractions, they treat them separate from the relationship that they could or should have with the right they protect. This is because in these canons, these actions appear as a purely procedural right, which the defendant has to obtain lawful protection against the plaintiff, regardless of the right being claimed. Moreover, only a vague reference to that protected right can be inferred when c. 1494 § 1 refers to the connection of causes or to a certain situation with compensation, as justifying the advisability of filing a counteraction.

8. P. CALAMANDREI, "La relatividad del concepto de acción," in *Estudios sobre el proceso civil* (Buenos Aires 1945), p. 136.

9. Cf. F. ROBERTI, *De processibus*, I (Vatican City 1946), pp. 68–71.

In connection with an accumulation of actions, regulated by c. 1493, there is also a focus of the action more than as a procedural protection of a right, as it is described in c. 1491, as an abstract right, the appropriate procedural exercise of which only can be prevented if some actions are in conflict with others, also with a vague reference (*sive de eadem re sive de diversis*) to an undetermined juridical matter dealt with by accumulated actions.

On the other hand, cc. 1496 and 1497 expressly mention the rights that actions for provisional remedy protect, by which these actions appear as specific procedural rights, related to a subjective right that one believes to be threatened, with the resulting effects of damage feared for their holder (c. 1496), or as a right to ensure unpaid credit.

Canon 1500 refers to possessory actions, which are not actions that protect subjective rights but which arise for the acknowledgment and protection of factual situations that deserve to be protected through the process, regardless of the rights in which they could be justified.

Therefore, it could not always be said from these canons—outside of what is described in c. 1491 and provided in c. 1495—that action according to the *CIC* is always a formal instrument for protecting subjective rights. In a previous work,[10] we noted, not only for possessory actions but also for actions for the nullity of marriage, that there was not a prior subjective right as a support for their exercise, but simply a juridical situation that was apparently valid, but which intrinsically displayed a radical defect that justified the declaration of nullity, when it was a question of nullity of the marriage. The action has its root in the same juridical situation that, due to the fact that the defect is present, calls for a judicial declaration that, because of the claim of a legitimate interested party, establishes the nullity of marriage before ecclesiastical society, with the resulting effects for the spouses. Therefore, we stated, "Art. 2 of book VII, part III, title I of the *CIC* rightly includes the canons related to the active standing of the special process for nullity of marriage under the heading *De iure impugnandi matrimonium*; and its c. 1708, for the nullity of the sacred Ordination, uses the terms *ius habent accussandi.*"[11] Moreover, c. 1721, for the penal judicial process, provides that the ordinary will submit to the promoter of justice the acts of the proper penal investigation *qui accusationis libellum iudici ad normam cann. 1502 et 1504 exhibeat.*

In these latter cases, the *CIC* does not use the word *action*. Instead, other terms are used, denoting a procedural initiative of the subject, who, starting from a prior material-juridical situation, turns to the competent judicial organ, in the manner established by cc. 1502–1504, to ask that the process be opened and a favorable judgment be pronounced for the subject

10. Cf. C. DE DIEGO-LORA, "La tutela procesal de los derechos en la Iglesia," in *Ius Canonicum* 34 (1994), pp. 55–64.
11. Ibid., p. 60.

against another. This also occurs when absolute nullity of juridical acts is requested because of a violation of the provisions of cc. 124 § 1, 125 § 1 and the first subparagraph of 126, or when rescission of juridical acts is requested in the event of a defect that is not a cause for absolute nullity, such as in the situations described in c. 125 § 2 and the second subparagraph of c. 126. Moreover, the obligation to repair damage caused unlawfully, if not satisfied voluntarily by the person who caused it, justifies the fact that the party who suffered it may exercise an action for reparation of the damage (c. 128). Canon 1729 § 1 classifies the right of a party prejudiced by a crime to judicially claim reparation for damages as a contentious action.

The *CIC*/1917 regulated actions in cc. 1667–1700. The *CIC* has shortened this treatment in those general and special aspects related to the action, despite the fact that c. 1491 maintains the same concept of actions as c. 1667 *CIC*/1917. In the sessions of the *Coetus studiorum de processibus*, held October 23–25, 1978, although the *schema* had already been presented with a more simplified systematic structure than that of the *CIC*/1917, those canons were trimmed of issues related to petitory and possessory actions and their convertibility, as well as actions for interim relief and those referring to matrimonial causes, because they were thought to be more appropriately included in the section on marriage. Moreover, actions for the nullity of juridical acts and actions for rescission were eliminated, because it was thought this regulation would be more appropriate among the general norms related to juridical acts. Chapter VI, dedicated to possessory actions and remedies was eliminated, because it was thought that it was preferable to opt for a suitable canonization of civil law. From that moment, the organization used for actions and exceptions in the *CIC* was exactly reflected in the draft legislation.[12] It is worth bearing in mind that the extinction of actions, regulated in cc. 1701–1705 of the *CIC*/1917, appears presently as cc. 197–199 in book I, under the title *De praescriptione*. These canons do not expressly use the word action. Rather, they mention terms characteristic of substantive law, which are prescription in law and obligations. Extinction due to prescription of a criminal action and execution of the sentence are addressed in book VI, *De sanctionibus in Ecclesia*, in cc. 1362 and 1363.

6. *The juridical reason for petition*

Although c. 221 §1 refers to rights, it stresses the fact that protection must be *ad normam iuris*. It may be exercised if those entitled agree to obtain protection through administrative means, as well as if they use judicial means. If protection is not achieved through administrative means, or if there is an insoluble juridical situation that the interested parties cannot handle, it will be possible to use judicial means in the ecclesiastical

12. Cf. *Comm.* 3 (1980), pp. 67–81.

forum in exercise of the right to be served by the organ of judicial power and the right to a process with juridical guarantees that are foreseeable and regulated in book VII of the *CIC*.[13] However, c. 1476 extends procedural protection to everyone; therefore, juridical protection through judicial means is not limited to the baptized, as can be deduced from c. 221 § 1. In fact, this canon provides that members of the faithful have this right, but that does not mean that only they have it, since duly constituted juridical persons also have it (c. 1480).

It must be noted that c. 221 § 1 refers to the faithful *competit ut iura, quibus in Ecclesia gaudent, legitime vindicent atque defendant.* Moreover, according to c. 1491, what the action or exception protects is *quodlibit ius*. This leads to the problem of whether only subjective rights can be protected in the judicial process, or only rights attributed to a given holder who, as the plaintiff, has in his or her favor the action of the corresponding claim; and as the defendant, if the plaintiff's claim is opposed as such, it will be done with the appropriate exception.

However, in the *CIC*, claims are foreseen, before the judge and against the opponent, which do not necessarily derive from the fact that there is a prior subjective right in favor of the person exercising the action. In any event, what the plaintiff before the judicial organ affirms is not a claim to hold a right or to be acting on behalf of or in the place of that holder. What is affirmed is that one has the right to action, so that the judge or tribunal declares the nullity of a juridical act, a contract, or a marriage, which suffered from a radical defect that made it null from its beginning. Moreover, whoever claims against another contractual rescission is limited to maintaining the affirmation of the defect appearing in the juridical act being challenged. Additionally, whoever requests reparation for a damage suffered, what he or she will affirm is the existence of this damage and what has been unlawfully caused by his or her defendant or by means of fraud.

In view of these issues, one may wonder if, in the case of the exercise of these actions, these actions can be considered in such a way that they are only related to the process they stimulate in its initiation. Then, this type of claim could be classified as a mere exercise of an abstract right, directed by the plaintiff to the judge against an opponent, for the sole purpose of being met by the organ of justice and of being able to further the process, *ad normam iuris*, until the judgment is pronounced. It is worth considering the actions described above to recognize that, although they do not protect any prior right, they have a close relationship with factual situations from which juridical consequences result and from which juridical power to demand justice arise, based on just favorable expectations.

In book VII, every reference to action is also a reference, as that of c. 1491, to the right one is seeking to have protected. However, there are

13. Cf. C. DE DIEGO-LORA, "La tutela procesal..." cit., p. 61.

some specific references to factual situations from which insoluble juridical disputes arise. Even criminal actions require not a right, but an investigation on the criminal act, on its circumstances and its imputability (c. 1717 § 1), which justifies the fact that the ordinary must decree that the promoter of justice must initiate a criminal process through the criminal complaint.

The abstract right to turn to the tribunals of justice does not exist in the canonical system if there is not a prior claim by the plaintiff of a juridical reason for the petition. Therefore, every judicial petition formulated by the party taking the procedural initiative is a judicial petition based in law. This juridical basis of every procedural claim is inherent to the canonical procedural activity.

That juridical basis of the claim can consist of the declaration of the prior existence of a right that deserves to be protected. However, it also can consist of the fact that a subject, in connection with a juridical situation or a prior fact, claims to have an interest that deserves protection and seeks to have it satisfied according to the spirit of justice inherent to the canonical system. It is called *legitimate interest.* At times, in the context of justice that the canonical system seeks to establish, even the right will deserve to be unprotected by the action, in that the action comes from the right, as long as the right is not exercised within its just limits.

The right that one is seeking to protect cannot be a right that one is seeking to establish, for example, through fraudulent evasion of law or an attempt to abusively exercise it, especially if it prejudices a third party. If an action exercised based on a certain juridical entitlement, which is procedurally verified, can be challenged in an exception, with the defendant claiming the fact preventing it from being exercised outside or against the just objective governing the canonical system, the action cannot be successful, even if it is based on law. Therefore, on these occasions, for the person exercising an action, it will not be enough to prove the right. The party also will have to prove that he or she is acting by virtue of a legitimate interest justifying the granting of the procedural protection sought.

When the action does not tend to protect any prior subjective right, but is exercised because of a legitimate interest emanating from a prior juridical situation or a mere factual situation from which juridical consequences result, the party making the claim will have to: *a*) describe in the complaint that situation and the juridical effects resulting there from for the plaintiff, resulting, for the plaintiff, from a legitimate interest deserving judicial protection; *b*) prove it with suitable evidence. In this way, on every occasion, it will be the legitimate interest that in justice supports the plaintiff's claim. When the plaintiff is in turn the possessor of a right, which he or she seeks to have protected by the action, it will be sufficient to affirm and prove the right for it to be presumed that the person claiming to possess it consequently enjoys the legitimate interest. Only when the opponent challenges or contradicts it must the plaintiff prove that, with

the right, that interest is also present. On the other hand, when it is believed that the action emanates from the aforementioned situation, the legitimate interest linked to its person will have to be proven first.

Regardless of any figures of indirect standing, because of substitution or representation, which may occur, in general, *ad causam* standing in strict terms is correlative to the entitlement to the action. In short, for the action, it is the legitimate interest to be judicially protected that is the basis for its existence and makes it possible for the situation to be transformed, on the initiative of the party with the interest, into sufficient cause for obtaining the judicial protection and initiating the process, the sphere in which the protection takes place.

Therefore, in the canonical system, neither the right to turn to courts of justice in the Church, nor the right to initiate the process, occurs independently of the right to seek a specific juridical *res*, the affirmation of which, duly founded, is what allows access to the tribunals and for them to give way to the process. From this point of view, according to Chiovenda, the action is an expedient right, a non-mandatory right, but not necessarily for the application of the particular will of the law, but for the introduction of justice in ecclesiastical society, in the bilateral and multilateral relationships of its members. This occurs when the will of the party who can exercise the action asks the tribunal to agree to the *quid* (c. 1504,1°), through a decree admitting the complaint, which is the formal expression of the procedural claim. This *quid* is formulated in the complaint, after subjection to the process, and to its effects, of the subjects involved passively, in that they have, at least virtually, an adverse interest.

Therefore, every complaint must indicate which right the plaintiff is basing it on, as well as the facts and the evidence of what is stated therein (c. 1504,2°). These complaints include the oral plea: c. 1503, even if in this case the technical perfection of its drafting is minor or is expressed in elementary terms, but must of necessity be expressed. If these requirements are not contained in the *libellus* of the lawsuit, the complaint must be rejected *in limine litis* by the judge or the presiding judge of the tribunal (c. 1505 § 2,3°). The petition also must be rejected when, concerning that *quid* being requested, the judge can infer with certainty that it lacks grounds, *neque fieri posse, ut aliquod ex processu fundamentum appareat* (c. 1505 § 2,4°).

7. *The consistency of the action is brought about in "quid petatur"*

The necessary juridical basis of what is asked of the judicial organ is what justifies the action and initiates the activity of the judicial power in the Church and the opening and progress of the process. What is requested by the plaintiff—intimately dependent on the *causa petendi*—is determined by the juridical foundation supporting the petition, which sets forth the demand for justice inherent in the specific case, as described by the

plaintiff in the *libellus*. In each case, the action will have the name derived from the *causa petendi* being claimed. Some of the names for the action include nullity, rescissory, for reparation of damages, for interim relief, possessory, *etc.* However, it is not the name that concerns us, but their basis and whether what is being requested is consistent with what its cause and basis is. Some have their names in the *CIC*, but most do not. Moreover, for some specific purposes, those for execution of the judgment, the *CIC* sets forth the classic distinction between real and personal actions according to the nature of the *res* on which the execution takes place (c. 1655). Nevertheless, their designation in the canonical procedural system today is immaterial. What is important is determining precisely together with the petition what the cause of action is: both together constitute the object of the process. Indicating the specific cause of action is at times an opportunity for an attentive demand individualized by the *CIC*, as in causes for the nullity of marriage (c. 1677 § 3) and for the separation of spouses (cc. 1152 and 1153).

What is important at this juridical moment is to specify the *quid*: a *quid* juridically caused and sufficiently described in the petition.

That *quid petatur* states that those who are petitioning seek to have the judicial organ, at times, pronounce merely *declarative* judgments, on realities that it is fair to recognize; at other times, *constitutive* judgments, at times being pronounced for the juridical creation, by the modification of the pre-existing juridical rights, relationships or situations, or their extinction; at other times, *condemning* judgments, from which result obligations to give, do or refrain from doing something. The fact that different types of reasoned petitions can be formulated that will give rise to various types of judgments, distinguished according to their pronouncements, leads procedural doctrine to classify actions as *declarative, constitutive, and condemning actions.* However, these different actions have a common denominator: actions, like specific rights, despite the variety in which they can acquire consistency in petitions from which they derive, always lead implicitly to the same thing, for a favorable judgment to be pronounced, in expectation of which the petition is formulated. Therefore, the procedural action in the canonical system is an optional right, but it is also a right that exists to the extent that it is converted to procedural action with the presentation of the petition before the organ of justice. The action achieves existence when it becomes present when revealed, to the extent that it is a formal expression manifested in the *libellus* of the lawsuit and this *libellus* is presented to the judicial organ.

8. *Juridical probability and expectatison of a favourable sentence*

How is it possible to classify action as a right that opens with the expectation of a favorable judgment, when it is possible for the judgment to be pronounced contrary to what is requested by the plaintiff?

The action is exercised and immediately proceeds to the process. All activity arising with the action itself rests on the proper and personal appraisals and opinions of the party exercising it. In this way, the procedural action takes us into a world that then requires proof for a final pronouncement by the judicial organ. Everything that goes into the process is subjected to juridical criticism. The action uses the subjective belief of the party. On the other hand, to pronounce a judgment, the judge needs moral certainty. The descriptions that the plaintiff gives in the petition to support the right for which a favorable judgment is expected, give us some juridical probabilities that what is asked for is just and deserving. That *fumus boni iuris*, without which there is no action, is enough entitlement to submit to the judgment of the judge or tribunal the *quid petatur*, and its cause, but that subjective appraisal of the right by the interested party is not the same thing as actually having it.

The *fumus boni iuris* is sufficient cause for there to be a process and trial in the tribunal, but it is not sufficient cause for the judgment to be favorable. The right to action is a right subject to the judgment of someone who is not a party; just as any argument that tends to convince of the right, or any evidence presented supporting said declarations, is subject to this judgment. The action belongs to the party who formulates these declarations. The juridical probability makes possible the existence of the process and the judgment, but not the agreement between the judgment and the petition of the party. The juridical probability in which the parties take refuge, a product of the statements contained in the complaint, makes possible the entire unfolding of the process until the judgment, but it cannot determine the content thereof. The judgment does not devolve upon the party who has the right to action, but upon the judge or the tribunal. The right to action does not for this reason cease to be a right that leads to a judgment favorable to the will of its possessor, the plaintiff. However, as many other rights have limitations, and in this case the limitations come from the very nature of the right to action, in that it is a procedural right, which is exercised in the process and only for it, subject to limitation of the formal channel in which, based on the juridical probability arising from reasoned statements, it usually produces all the procedural effects that the same procedural law provides, in expectation of a favorable judgment. Nevertheless, this judgment is not a direct consequence of the action, because it does not belong to the power of the party, possessing the action, but to the power of the judge or tribunal that will rule on the action.

Therefore, the action is the expectation of a favorable judgment and, because the party has this expectation, the action is exercised. In this context, the exercise of action has all the formal effect derived in the procedural sphere, even if the action is intimately related to the world of juridical-material realities, regardless of whether the judgment meets the expectations of the party possessing the action. The party, from his or her right to action, cannot make use of the main issue of the process, of the

merits of the case. Even if it is connected because it is a concrete action, this causal connection is found only in the intention and in the plaintiff's statements of will, even if it is supported with objective reasons. However, its functioning will only take place temporarily in the process, to the extent that the juridical probabilities are worthy, *prima facie*, of juridical protection, of the attention given them by the judicial organ in the process, where the action acquires juridical verification.

Nevertheless, an action does not bring about a favorable judgment. Its effectiveness ends now in which the procedural activity is pending a judgment before the organ of justice. The action continues to retain the force of a petition and determines the judicial pronouncement, which must respond to what is requested, but does not affect the autonomy with which the judge must issue the judgment. The action is a right of the party; the pronouncement of the judgment, even if it is an effect of the action, is within the exclusive competence of the organ of judicial power. The right to action cannot invade this juridical space, which does not belong to the party. The right to action expects a favorable judgment, affects the judgment of the judge, which must only respond to what was asked, but does not determine, nor can determine in any way, the ruling itself which is issued in the judgment, the sole function of the judicial power.

II. On exceptions

1. *In the CIC*

The secondary attention given to exception in title V is understandable, because the exception does not start the process. It does not have the leading role that the action has, because it allows the interested subject access, through a claim against another, to the organs of judicial power, the initiation of the process and the resulting progress of the activities that are driven by virtue of that expectation, to a favorable judgment, which is linked to the exercise of the action. The action has the force to make possible the shift from material juridical realities to the formal juridical realities that take place in the process. None of this occurs with the exception, which is a protection, distinct from the action, which the rights also have. It is distinct because the c. 1491 distinguishes it when it says *sed etiam exceptione*.

From cc. 1459, 1460 and 1462, it may be deduced that the exception is a procedural means for opposing any action or actions exercised at times for procedural reasons, at other times for juridical-material reasons (see commentaries to cc. 1459, 1460, and 1462). Therefore, exceptions are a means of protecting the subjective right that the passive party in

the process can use in his or her favor—*a quo petatur*, in the words of c. 1504,1°—for the person who comes to be the defendant in the process, after the lodging and admission of the petition, to object to the action.

Exceptions are not mentioned in any canon referring to the citation of the defendant or to the *litis contestatio*, in the ordinary written process. Canon 1507 § 1 only states, concerning the citation, *ad litem contestandam* and *ex scriptus responsionibus*. Paragraph one of c. 1513, regarding the *litis contestatio*, only states *ex partium petitionibus et responsionibus desumpti*, while, in § 2, *possunt vel in responsione ad citationem exprimi vel in declarationibus ore coram iudice factis*. Not counting cc. 1491 and 1492, and references to exceptions in cc. 1459, 1460 and 1462, it seems that specific references to exceptions are of no interest in the ordinary contentious process, at least explicitly.

On the other hand, other canons, such as c. 1449 § 1, classify as an exception the opposition that arises through the recusal of the promoter of justice, the defender of the bond or another minister of the tribunal. Moreover, by analogy, the defendant's recusal of the judge can be understood as an exception, although cc. 1448–1451 do not use the term exception to regulate the recusal. Another general provision, c. 1452 § 2, provides that the judge may compensate for the negligence of the parties in the process and authorizes him to file exceptions *quoties id necessarium censeat ad vitandam graviter iniustam sententiam.*

On the other hand, outside of the trial itself, competencies are granted to the executor of the judgment in c. 1654 § 2, *Vida de exceptionibus circa modum et vim exsecutionis*. Above all, it is in the oral contentious process, after the defendant gives the written answer (c. 1659), when the importance that exceptions may have within the defenses to be executed within the process itself is stressed. Even c. 1660 authorizes the judge to indicate a term for the plaintiff to respond to said exceptions, and to take charge of the object of the dispute. Likewise, within this process, once the moment arrives for the acts of the hearing of the parties before the judge to be drafted, c.1664 orders the notary to set forth in the acts *petitiones et exceptiones advocatorum.*

It must be procedural doctrine that will explain exceptions and the defensive role they have for the defendant in the canonical process. Roberti dedicates the last pages of his Vol. I[14] to exceptions, enlightening us about their Roman origin. For this purpose, he uses Ulpiano's definition: "Exceptio dicta est quasi quaedam 'exclusio', quae opponi actioni cuiusque rei solet ad excludendum id quod in intentionem condemnationemve deductum est." In classic Roman law, it consisted of a clause included in the formula, by which it was understood that the case was excluded from the general mandate of the conviction. In Justinian's law,

14. Cf. F. ROBERTI, *De processibus*, cit., pp. 671–679.

according to Roberti, exceptions are confused with any other type of defense. Roberti states that this also occurs in modern codes.

2. *Exception is a right in the process*

For Roberti, there is a broad concept of the exception that includes any denial of the action, and a strict concept, which is the one that excludes the action. This second concept is the current *CIC*'s concept of the exception, as was also the case in c. 1667 *CIC*/1917. It appears in the *CIC* as a right of the defendant against the action being exercised. Garcia-Failde says that it is "a *means* by which the *action* is confronted either in an attempt to exclude (cf. the exception of finished lawsuit, the exception of incompetence, etc.) or to delay (cf. the exception of suspicion, etc.) the process."[15]

There seems to be no doubt that the defenses understood as negations—either only of the facts set forth by the plaintiff or, on the other hand, of the juridical consequences deduced therefrom in the complaint, in which case it more correct to speak of a contradiction—are not exactly exceptions according to the code's concept. This is not only because the exception must have its own independence, but also because it has its own consistence. The exception is only conceivable, to the extent it is manifested when exercised in the process as a right of the defendant against the plaintiff's action, but needs to be exercised against the action to be manifested. Without the antecedent action, using the term and concept of exception is meaningless. However, once the appropriateness of claiming the exception exists, the exception demonstrates its consistency, even if it depends on the fact that the action has first been exercised.

For the *CIC*, the exception is focused, not on all the possibilities, but on one of its foreseeable aspects, because it is a means of protecting a prior subjective right. However, the action does not only protect rights, but legal and factual situations with juridical consequences. This is because it also protects the legitimate interest of a subject of the system to be protected judicially therein. The same thing occurs with the exception when this subject is procedurally attacked in this situation. Some of the examples indicated by Garcia-Failde remind us how the exception does not always coincide with the prior existence of a prior subjective right that it can protect if claimed. For example, when c.1627 provides that the plaint of irremediable nullity can be continuously lodged as an exception, it does not refer to any prior right of the defendant, but contemplates the reaction that the defendant can have in connection with a juridical situation derived from a judgment that one wishes to have executed in prejudice thereto, even though this judgment suffers from an irremediable

15. J.J. GARCÍA-FAÍLDE, *Nuevo Derecho Procesal Canónico* (Salamanca 1984), p. 17.

defect of nullity. All the procedural exceptions still have, as a whole, those characteristics, because they arise from improper situations, which deserve to be challenged.

Therefore, the exception is a defendant's right to defense that is a procedural right that can effectively protect a supposed subjective right of the defendant against the action exercised by the plaintiff. However, it must also be considered as a procedural right with a broader scope, based on the protection of the legitimate interest of the defendant in objecting in justice to what the plaintiff requests in the complaint. The protection of legitimately-exercised subjective rights as well as the protection of other legitimate interests, from the defendant's point of view, give the defendant the right to a procedural exception as a procedural right with proper juridical consistency, albeit only regarding possible exercise in the process, the sole sphere in which the exception can be exercised and where, once claimed, it acquires juridical relevance and possible efficacy if the juridical basis on which it is alleged is proven.

The phenomenology with which exceptions are presented in the process is varied. It depends on the factual and juridical situations in which the defendants find themselves with respect to the persons and things that make up the procedural relationship, arising from the exercise of the action and of the subsequent citation for the passive subjects to answer and defend themselves. However, all exceptions consist of an affirmation before the judicial organ of a fact claimed against the affirmation of the plaintiff, so the complaint will be rejected. This fact must be proven by the defendant, according to the rules of the burden of proof set forth in c. 1526.

3. *Procedural exceptions: their characteristics*

Exceptions can be for the purpose of disqualifying the process in which the action is presented, preventing it from being the proper legal channel for that action to be successful as the plaintiff used them to formulate his or her requests. These are the *procedural exceptions*. Examples of this type of exceptions are described in cc. 1459 and 1460.

Common to all these exceptions is the fact that they oppose the exercise of the respective actions, but without resolving in any case the basic issue of the case in chief, which remains intact. Through the procedural exceptions, the claimant argues that the procedural suppositions for the process to begin validly have not been observed. At other times, it will refer to the requirements that must be met, but the noncompliance with which entails a violation of law. These defects, shown to the judge in a timely manner (as can be, e.g. noncompliance with the norms regarding relative competence), force the process to stop until the incidental claim

arising from the exception is resolved, and even, eventually ends the same procedural activity that already began.

When procedural defects refer to the procedural requirements, the judge or the presiding judge of the tribunal receiving the complaint must give notice thereof and reject it according to the provisions of c. 1505 § 2. Only if they are mere formal defects is when c. 1505 § 3 allows the plaintiff to make corrections. It is not unusual—when they are essential procedural defects, which will affect the validity of the process and of the judgment—for the exception, which is still by nature a procedural right of the party, to become a duty to give notice as the responsibility of the juridical organ itself, as authorized by c. 1459 § 1. That can be justified for the sake of judicial economy, contrary to some activities that are useless because they are radically null. However, it can also be determined in the service of the gravity with which the process must be handled by the organs of judicial power, the proceedings of which, unfolding in the public sphere of the process, must from the beginning aspire to validity, regardless of the ultimate result with which the judgment is pronounced. This ex officio proceeding of the judge in the cases of procedural nullity, making use of the exceptions, which in principle are rights of the parties, is in turn consistent with that general power that c. 1452 § 2 grants to the judges to compensate, in service to the justice of the Church, for the negligence of the parties, by being able to use the exceptions if they can help to avoid a gravely unjust judgment. These provisions are manifestations of the canonical system favoring objective justice, and an attempt to prevent the initiative and dispositive power of the parties from making the process into a risky instrument that could serve in some case the stronger party, or the party with better technical assistance, prejudicing the party that justly deserves judicial protection in the case. The institutional objective that the canonical process seeks to carry out authorizes these judicial initiatives against the absolutization of the principle of parties' initiative.

Procedural exceptions, since they are not used to resolve the basis of the issue of litigation, prevent the judge from pronouncing on the action presented. Therefore, even if the exception places the process in a definitive crisis, preventing it from proceeding on to the judgment on the case in chief, it must be presented as a "preliminary" matter, and in principle—regardless of any success in its presentation—it is exercised as a *dilatory* exception (c. 1459 § 2), that is, as an exception that halts the progress and hinders its progress until the judicial organ issues its ruling on the exception. If this ruling is in favor of the exception, normally the case in chief is extinguished. However, if the procedural exception is not sustained, the case in chief may proceed towards the definitive judgment. Therefore, given that preliminary nature and that dilatory nature of the procedural exception, it is understandable how c. 1459 § 2 provides, in principle, that these exceptions must be presented before the *litis contestatio*, to avoid procedural activities lacking validity.

4. *Peremptory exceptions: their nature*

Juridical phenomena distinct from procedural exceptions are statements of the defendant directed not against the initiated process and its circumstances, but against the very action exercised by the plaintiff. These exceptions are directed against the rights claimed by the plaintiff, or are intended to deny the legitimate interest with which the plaintiff supports the claim. They can also be used to excuse the defendant because he or she is at least virtually holding the adverse interest maintained by the plaintiff in the complaint, when lodging the action against a certain subject and not, on the contrary, against another who has nonetheless been called to the process. These exceptions, which are classified as *peremptory*, are presented—and in turn require evidence—to disprove the very object of the process, as configured by the plaintiff and by the subsequent formulation of the issue, as well as to discredit the active and passive standing as claimed by the plaintiff in exercising the action.

Should the peremptory exceptions be successful, against the factual and legal statements of the plaintiff, the plaintiff's action will lose its consistency, become without effect, or better, be rendered useless, because it lacks justification. The characteristic of the peremptory effect of these exceptions is that the process is not halted, but it continues towards the judgment, but the judgment will deny the requests of the complaint (c. 1608 § 4). In fact, peremptory exceptions, as regards the action, will become, together with the action, the very basis of the litigation, the so-called issue of merit.

Peremptory exceptions are also designated as *substantive* exceptions or exceptions *of a material right.* In principle, it is worth stating that they are not dilatory, although in historical law, some juridical-material exceptions have been presented as dilatory exceptions: this occurred with exceptions of *pactum non petendo,* for contract noncompliance by the plaintiff, or the exception of anticipation of the action due to noncompliance with a term or condition in the personal obligations. They have been able to be considered as dilatory exceptions even if they affected the substance of the litigation. However, the efficacy of the exception did not destroy the action exercised but left its efficacy suspended until compliance with the other part of the agreement, or until its term for demandability arrived, or in the event that the condition was satisfied.

Considering these phenomena as originating dilatory exceptions still seemed anomalous and truly exceptional. And on occasions it has only helped procedural doctrine create this intermediary figure, of a substantial and dilatory nature, as a way of introducing a wedge into the clear distinction between procedural actions, which in turn are dilatory, and substantive actions, or of material law, of a peremptory nature. At times, it has been forgotten that it would be more appropriate to speak of the lapsing more than of the delay of the same action exercised as described by

the plaintiff. In these situations, the identification of the action would normally lead to allowing the process to progress until the judgment to absolve from what was requested in the complaint, because the configuration of the request did not correspond to the action that should have been exercised. This does not mean that, once the appropriate time comes, the possibility of presenting the action would be completely ruled out. The configuration of facts subsequently presented, creating in justice a new formulation of petitions, deserves to be handled later; because in fact the cause of action has been modified to the extent that the action then exercised is distinct from the previous one that was rejected.

5. *So-called mixed exceptions*

Peremptory exceptions that can be presented as dilatory exceptions are, in my opinion, only the so-called *mixed* exceptions, which are set forth in c. 1462 § 1 of the *CIC* It is not that they are dilatory by nature, because they are peremptory, and some, like the adjudged matter exception, can be perceived ex officio by the judge or tribunal (c. 1642 § 2 *in fine*). That is, their efficacy is directly motivated for the purpose of discrediting the action exercised, denying it the possibility of any efficacy when an opposing juridical act is affirmed, which eliminates any hope that the action exercised can be successful. The juridical situation prior to the exceptions described by c. 1462 § 1 had been definitively resolved by other juridical phenomena such as the transaction, adjudged matter, finished lawsuit, arbitration decision, which have in turn given rise to new juridical situations from which new actions derive, usually of an executory nature, but with that prior juridical situation being ruled out, for the future, as a source of actions, inasmuch as this situation was extinguished or substantially altered by new juridical acts, constituting new juridical and factual situations.

Not only a fundamental reason of judicial economy lends weight to their being exercised as dilatory exceptions, but to that is added the weight of the documentary evidence, and many times through the public document by which those juridical acts are usually granted, which simplifies the need to develop the procedural adversarial action to its full extent. Therefore, it is advisable for them not be presented as peremptory exceptions in the joinder of issue (c. 1462 § 2), but, as the same dilatory exceptions, before the joinder of issue (c. 1459 § 2). Through this special proceeding, it is possible to avoid this type of incidental matters, unnecessary activities, because the evidence of the mixed exception is easily presented through a preliminary proceeding. Their dilatory nature does not proceed, then, from the nature of the exception itself, but from the procedural opportunity that the legal provision offers the party, who can exercise it, for reasons of judicial economy, so that issues with a clear solution are definitively resolved, without having to wait through the entire process.

6. *The diversity of the nature of acts, the reason for peremptory exceptions*

One last reference to the facts set forth in peremptory exceptions. They are facts that would normally be effective by themselves. They are facts that have extinguished, when presented, the right of the plaintiff or the same action that the plaintiff could exercise, or they are facts that prevent the initiation of the action, or that have substantially altered the juridical situation with which the action could be previously justified. However, these facts must be made known to the judge for the judge to hear them and rule on the request resulting from the action exercised, with full knowledge of the cause.

Other times, there will be exceptions that also need to be lodged, because the factual phenomena that support them have not extinguished, radically altered, or prevented, with their own initiation, the prior situation, but exclude the exercise of the action only if said new fact is set forth by the defendant. These latter exceptions always function through the will of the party who at the proper moment in the proceedings chooses to present and prove them: *ope exceptionis*. If the defendant did not do it, a judgment recognizing the action to his or her detriment would be just, because the action exists and the excluding factual allegation belongs to the juridical patrimony of the will of the litigant.

In medieval law, these exceptions were called *exceptionis iuris*.[16] They also have been classified as *proper* exceptions, which is more consistent with the concept of the Roman exception, understood as a right to challenge the action. On the other hand, those facts originating the exception—extinguishing, modifying, or impeding facts—which in themselves have the force or efficacy *per se*, the firm efficacy that is advocated by said facts, will be designated, unlike the previous ones, as *improper* exceptions, because their efficacy against the action proceeds, more than from their allegation by the defendant, from the legal provision, such that, even if they were not alleged, the judge will determine them ex officio once he acquires moral certainty.

The classical example of an excluding fact is prescription, while extinguishing and modifying phenomena can be, for example, payment, compensation. At times fraud, fear, etc., originate exceptions that need to be alleged to exclude the obligation to fulfill a commitment by the party when said defects are present. On the other hand, an exemption of an impediment, even if not alleged by the respondent in a cause for nullity of marriage, if verified in the process, will be seen as a fact impeding the success of an action for nullity of marriage caused by an excusable impediment.

16. Cf. S.J. FARIÑA VACCAREZZA, "Las excepciones en el proceso canónico," in *Excerpta e Dissertationibus in iure canonico* 2 (1984), pp. 341–372.

Other well-described examples are offered by c. 1152, for causes on the separation of spouses due to adultery: a phenomenon extinguishing the action for separation is express forgiveness from the offended spouse, while the adultery of the other spouse, the act of having consented thereto or having been guilty thereof, will be facts impeding the separation action (§ 1). On the other hand, permanence in the relationship or cohabitation for six months engenders a presumption of tacit condonation that can be alleged as a fact excluding the separation action exercised (§ 2). Lastly, c. 1153 § 3 also provides us with a modifying fact, that of cessation in these cases of the cause of separation, which allows us in these cases to speak of a fact that will disqualify, from then on, from the exercise of the action for separation of spouses.

In fact, this entire type of actions, also in any other process, comes together with the action to make up the basis of the issue of litigation, which the judge or tribunal must incorporate into the formulation of the issue, which must be answered in the definitive judgment. Canon 1660 makes evident the importance that exceptions can have for the judge to be able to take charge of the entire object of the dispute, as indicated in c. 1660 *in fine*.

CAPUT I
De actionibus et exceptionibus in genere

CHAPTER I
Actions and Exceptions in General

1491 **Quodlibet ius non solum actione munitur, nisi aliud expresse cautum sit, sed etiam exceptione.**

Every right is reinforced not only by an action, unless otherwise expressly provided, but also by an exception.

SOURCES: c. 1667

CROSS REFERENCES: cc. 114–117, 214–215, 221 § 1, 223 § 2, 301 § 1, 322 § 1, 1492

COMMENTARY

Carmelo de Diego-Lora

1. The canon notes that both an action and an exception protect every right. They are like two aspects of the same right, because the right is being considered as a juridical-material situation of dissatisfaction because something is being denied that belongs to one. And it is deemed just for it to be satisfied through an action, or as a juridical-procedural situation already begun by a judicial action, from which for the right some type of damage can result that it seems just to avoid. Therefore, it is around the right, in the code's concept, where the procedural evolution originates, then develops towards the judgment.

It is true that the *CIC* makes no clear pronouncement regarding the doctrine of the action as an abstract right to a judgment or as a concrete right to a favorable judgment in each case. However, the connection of the action and exception in protection of rights shows a causal relationship in the action that can only be supported on the juridical appearance arising from a statement made before the judge which proves to be based on law, so that the party formulating the statement manifests the expectation that the judgment will be favorable.

In order to exercise the action, it is not sufficient to have the right. It is also necessary for the subject of the right to manifest with the action an expectation of a favorable judgment and to possess a legitimate interest in having this protection granted in the concrete case. In principle, that legitimate interest is presumed also to reside with the person who has the right and exercises the action or exception for his or her protection, because the canon states that every right is protected, *actione munitur.* Therefore, when—from another point of view, that of the defendant—that exercise of the action is challenged due to a lack of interest for the person claiming to have the right—due to abuse of the right, untimeliness in its exercise, concealing legal fraud, *etc.*—if this challenge proves to have juridical support, it shifts the burden of proof to the plaintiff. This is because the plaintiff must prove before the judicial organ not only the right, but also the legitimate interest with which he or she is acting in the process to protect it.

Canon 1491 does not exhaust all possible procedural actions, because it stops at actions to the extent that they protect prior rights, those *iura quaesita,* which may belong to the public law of the Church, as well as the sphere of private rights. Moreover, juridical and factual situations can arise from which juridical consequences result, which may become effective due to the procedural action, which arises from the same situation insofar as the action is exercised by the person who believes he or she deserves juridical protection in a specific case. Then, that interest that is said to be legitimate, for exercising the action, in expectation of a favorable judgment, must not only be affirmed but directly proven in the process, although the complaint must already state that what is claimed is worthy of judicial attention.

Therefore, actions and exceptions do not only protect a right; they are themselves procedural rights of parties with a right that can be protected. At times, this will be the plaintiff, who takes the procedural initiative of the action, and at others, it will be the defendant who, through the exception, opposes or contradicts the plaintiff's action. Every legal reference to the protection of a right actually contemplates protection of the subject holding the right, just as, if it is protection of juridical situations, what is really being protected are the subjects who in that situation enjoy a legitimate interest that warrants protection.

Actions and exceptions can only be considered in the parties' relationship to each other and to the judicial organ. Just the organ's standing is supported in law (jurisdiction and competence), the parties' standing is based on the legitimate interest of the plaintiff to demand justice and on the defendant's legitimate interest to appear as the adversary to that claim. Therefore, either a demand for protection of a right one claims to have or a juridical situation in which a subject believes he or she deserves protection is a process between parties, and the actions and exceptions are not only procedural rights protecting the right, but protecting those subjects who deserve to have their rights protected. At times, this

procedural right can be reduced to protection of even mere peaceful possession that cannot be disturbed by another, or that deserves to be returned for things to return to the situation before the dispossession.

2. Only in this context can the phrase in c. 1491, *nisi aliud expresse cautum sit*, be understood. In the official Spanish version, the text provides that actions and exceptions protect rights "*unless otherwise expressly provided*." Therefore, there can be rights lacking procedural protection, by express juridical mandate. There can also be rights that may lose procedural protection in certain situations.

The idea that a juridical system does not always procedurally protect holders of rights seeking legitimate protection is abhorrent. Nevertheless, since those rights are attributed to persons manifesting a desire to be protected, they could lack a legitimate interest in the exercise of those rights, which renders them undeserving of protection. Undoubtedly, an action against which the prescription exception is presented (c. 1492) would be ineffective in its exercise. Even if the right has not ceased to exist, the holder is bereft of any legitimate interest that could allow it to be exercised effectively, because of the exception.

In the *CIC*, it is possible to find other rights that can lack protection for their holders, for example, some belonging to the fundamental rights of the faithful. Concerning these rights, the ecclesiastical authority must regulate their exercise with regard for the common good of the Church (c. 223 § 2). Consequently, the right of the faithful to practice their spiritual life must be exercised according to Church doctrine (c. 214); therefore, there is no foundation for making a claim against a decision of the competent ecclesiastical authority prohibiting the exercise of a particular form of spiritual life contrary to Church doctrine.

In addition, canon 215 recognizes the right of the faithful to found and lead associations. However, the exercise of this right is subject to the requirements of cc. 114–117, as well as the general provisions for associations of the faithful. Therefore, anyone seeking to exercise his or her right to association contrary to the provisions of canon law will lack the legitimate interest to demand justice, through procedural action, against any legitimate authority of the Church that is opposed to the exercise of this right. The right of the faithful to establish associations must be compatible with the need for canonical erection, in the case of associations that plan to impart Christian doctrine, promote public worship or meet objectives reserved to the ecclesiastical authority. Moreover, no one may exercise procedural actions demanding that canonical erection be granted to them, since this act of erection devolves only upon the legitimate authority of the Church (c 301 § 1).

Even if private associations have autonomy, no member of the faithful may found a private association intending it not to be subject of the supervision and governance of the Church authority (c. 322 § 1). It will not

be lawful to lodge an action if the authority does not grant a formal decree recognizing the juridical personality of the association, because the faithful lack legitimate standing to make the claim.

Similarly, while the faithful have the right lawfully to claim the rights they have in the Church, they must do so *ad normam iuris* (c. 221 § 1). Anyone who attempts to claim these rights through other channels lacks a legitimate interest and is unworthy of judicial protection.

Therefore, it is apparent that the existence of a right is insufficient for the action to protect it, since it will be the legitimate interest that is united to the exercise of the right that will make the exercise of the action legitimate in its protection. The proviso of c. 1491, which provides that there can be rights that are not procedurally protected, corresponds to the internal logic of the same actions and exceptions.

1492 **§ 1. Quaevis actio extinguitur praescriptione ad normam iuris aliove legitimo modo, exceptis actionibus de statu personarum, quae numquam extinguuntur.**

§ 2. Exceptio, salvo praescripto can. 1462, semper competit et est suapte natura perpetua.

§ 1. Every action is extinguished by prescription in accordance with the law, or in any other lawful way, with the exception of actions bearing on personal status, which are never extinguished.

§ 2. Without prejudice to the provision of Can. 1462, an exception is always possible, and is of its nature perpetual.

SOURCES: § 1: cc. 1701–1705
§ 2: cc. 1629, 1667

CROSS REFERENCES: cc. 124–126, 128, 197–199, 203, 1152 § 1, 1153, 1281 § 3, 1296, 1362–1363, 1462, 1465 § 1, 1520–1524, 1621, 1623, 1629 § 1, 1630 § 1, 1644, 1646, 1723, 1725–1727, 1729

COMMENTARY

Carmelo de Diego-Lora

1. According to §1, every action is extinguished through prescription or other legitimate means, with the proviso for actions on the status of persons. Section 1 of this canon contains three different provisions. The first two refer to the extinguishment of actions through prescription and other legitimate means other than prescription. In any event, extinction of actions must take place *ad normam iuris*. This requirement could mean that there is no phenomenon extinguishing actions that is not regulated expressly by law. The third of the provisions of § 1 is that actions on the status of persons *numquam extinguuntur.*

The first provision contained in the canon is that prescription extinguishes actions *ad normam iuris*. However, the prescription of the canons is not regulated in book VII, unlike cc. 1701–1715 *CIC*/1917. Moreover, the current *CIC* does not mention prescription as a phenomenon that extinguishes actions, other than in cc. 1362 and 1363 of book VI. Canon 1362 regulates extinction by prescription of criminal actions, and c. 1363 refers to extinction through prescription of the action of execution of the sentence. In cc. 1362–1363, prescription of the action is understood as the passing of time without actual exercise of the action, at the end of which, counting a day *a quo* and another *ad quem* (c. 203), given the public implications of these criminal actions and the *pro reo* principle, characteristic

of these processes (cc. 1723, 1725–1727), these actions are extinguished automatically. This way of extinguishing actions occurs regardless of the will of the interested parties. It forces the judge to declare ex officio extinction of the actionsif he finds that the time established by law has expired.

This type of extinction of actions, even if in these canons the term *praescriptio* is being used, is radically different despite the characteristic they have in common: the passing of the time for the exercise of the action without it being exercised through the claim in the required juridical form. The difference lies in the fact that prescription is a peremptory exception that doctrine usually classifies as proper, because it corresponds to the traditional concept of an exception, already in existence in Roman law, which considered the exception to be a right of the defendant by which the plaintiff's action was objected to, through the initiative against the action. Therefore, if this exception is not alleged, the claim initiating the action acquires its entire efficacy in prejudice to the defendant. Prescription, according to these phenomena, is understood to extinguish with the passing of the time established by law without the action being exercised, but its effectiveness takes place *ope exceptionis*. The right that originates the action, if the action is not exercised in the appropriate time period, remains with its demand for satisfaction in justice, and only the exception of prescription lodged by the defendant totally weakens the efficacy of the action.

Therefore, prescription, referred to in cc. 1362 and 1363, in general legal doctrine belongs to another type of extinguishing phenomenon due to the passing of a legal time limit, without the exercise of the right, which is designated under the term *expiry*; and in this case, expiry of criminal actions and of execution of the sentence. Thus, more than the extinction of actions through prescription, we have extinction for another different reason: *alio legitimo modo*, as stated in c. 1492 § 1. It is a way in which the judge must rule ex officio without any need for initiative from the defendant.

The word *expiry* is used correctly in the official Spanish version of the *CIC* in cc. 1520–1524 to translate the Latin term *peremptio* in reference to the instance that has been halted for six months without any procedural act occurring therein. Actually, its motive is the same phenomenon as a lack of due activity, in this case in the same development of the process, while cc. 1362–1363 refer to the same exercise of actions.

The *CIC*, with this type of effects for those who do not use their rights on time, indirectly sanctions negligence by the parties with these prejudicial consequences, or, if there is an attempt to dispose of subjective imputations, the actual lack of activity. There can be many reasons: concern for the stability of juridical situations, with the intent to prevent them from depending on capricious attitudes of the interested parties; the need to prevent the issues pending resolution from suffering from an indefinite

permanence causing distrust and uncertainty in juridical relationships; the principle of guarantee for third parties; and the elimination of obstacles impeding juridical activities.

That effect, for subjects that do not use their rights in a timely manner, is common to both expiry and prescription, although expiry takes effect *ope legis* and prescription *ope exceptionis*. In addition, starting from the distinction that exists between expiry of an instance and expiry of an action with regard to the object on which the *peremptio* operates, what is regulated by c. 1521 for that of the instance is equally applicable to actions: "peremptio obtinet ipso iure et adversus omnes ..., atque etiam ex officio declarari debet."

In connection with the extinction of actions due to expiry, even if there are no express legal references to this effect, wherever an action can be exercised, subject in its exercise to a legal term, there is a term of expiry, not prescription. This category includes that expiry characteristic of the final time limits, *id est termini perimendis iuribus lege constituti* (c. 1465 § 1). Under the effects of expiry *ope legis* of actions are included actions for challenge, characteristic of the appeal of judgments and decrees with the force of a definitive judgment (c. 1630 § 1), actions for nullity of judgments (cc. 1621 and 1623), and the action of the recourse *restitutionis in integrum* against the adjudged matter (c. 1646). Also included in this category is the action by which, in the administrative sphere, revocation or amendment of a decree (c. 1734 § 2) and the administrative recourse are requested, which must be lodged *intra peremptorium terminum quindecim dierum utilium* (c. 1737 § 2).

2. With respect to prescription *extinguishing* actions, the *CIC* canonizes the civil law in whatever territory the passage of time takes place without the exercise of an action. That prescription extinguishing actions of the c. 1492 § 1, *ad normam iuris*, according to c. 197, is the prescription that governs in the civil legislation of the territory. The good faith factor, required for the validity of canonical prescription (c. 198), is one that must be taken into account for acquisitive prescription, as a characteristic that is inseparable from any phenomenon of acquisition of assets and rights through possessory situations in good faith prolonged in time. Moreover, that characteristic is not normally taken into account in the prescription of actions, in which the passing of time extinguishes them if the defendant alleges it as a procedural defense by way of an exception.

The *CIC* has removed from its book VII many references to certain actions that were contained in book IV of the *CIC*/1917. In connection with this discussion of actions, the members of the *coetus* of legislative review preferred moving these actions to other books in the *CIC*, from the material norms of which they understood that actions result. In fact, a glimpse at book I, cc. 124–126, reveals the possibility of presenting actions for nullity and for rescission of juridical acts, but nothing is said about the term for their exercise. Moreover, c. 128 contemplates possible actions for

reparation of damages caused unlawfully by a juridical act or by another by fraud or negligence. Canon 1729 addresses actions for reparation of damages resulting from a crime, as a procedural option favoring the prejudiced party, who can exercise this action in the same procedural process begun by a complaint from the promoter of justice. When one contemplates the canons on the temporal goods of the church, one finds, with respect to their administration, a possible exercise of actions in c. 1281 § 3. Regarding undue transfers of ecclesiastical goods, c.1296 refers to another source of possible actions.

This dispersed treatment of possible actions by the *CIC* coincides with the greater silence with respect to determining the terms for their exercise. Consequently, it lacks any indication that could serve as canonical guidance for prescription extinguishing actions. Therefore, one must turn, in each case, to the civil law of the respective nation, pursuant to c. 197, albeit with the warning that, when the canon refers to the extinguishing prescription, it does not mention actions, but subjective rights and the release from obligations. This way of expressing the legal norm requires a careful analysis for the precise distinction between action and right and for the proper solution in the canonical sphere of the provisions of civil law. This same criterion must be followed for possessory actions, which nomenclature is used by c. 1500, and is also consistent with any effects that may result in connection with the prescription of actions originating in the area of contracts (c. 1290).

This last canon sheds light on other legitimate *ways* of extinguishing actions, such as payment, compensation, novation, judicial remittance, destruction of the thing, confusion, and remission. On the one hand, c. 1290 opens up broad possibilities for recognizing and assessing phenomena extinguishing actions through legitimate means other than prescription. However, it also limits our possibilities, because extinction of actions *alio legitimo modo* cannot be limited in canon law to the world of contracts or, using a broader interpretation, to the field of real and personal actions, which distinction is set forth, at least for execution of judgments, by c. 1655.

In conclusion, extinguishing prescription and other forms of extinction of actions, will be *ad normam iuris*, and will be lawful with respect to the method, depending on the civil laws of the territory, providing that the law does not violate divine law and there is no specific canonical provision ordering otherwise (c. 1290). Given that these phenomena extinguishing actions do not always have to necessarily originate in the patrimonial canonical sphere, the juridical operator should take every precaution, in connection with any strictly canonical phenomenon, when finding that actions are extinguished. The same canons regulating the various canonical institutions deserve to be carefully analyzed to reach moral certainty regarding the possible extinction of any actions that may have arisen, either through prescription or through other legitimate means.

3. The third of the provisions in c. 1492 § 1 is the express and definitive exclusion (*quae numquam extinguuntur*) on prescription and extinction in actions referring to the status of persons. Actions for nullity of marriage or sacred orders, the most commonly exercised in the ecclesiastical forum, are clearly included. Therefore, c. 1644 always allows a new presentation of the cause, with new and grave evidence or reasons, in causes on the status of persons.

One might wonder if termination of the case of separation of spouses, as regulated in c. 1153 § 2, also entails extinction of the action of separation, due to cessation or extinction of the phenomenon that is the *causa petendi* for separations of c. 1153 § 1. Were it so, extinction of actions for the separation of spouses also would be excluded from c. 1492 § 1. Moreover, in the case of adultery, express pardon directly extinguishes the action, just as other similar phenomena can be causes preventing or excluding the exercise of these actions (c. 1152). It appears that causes on separation are not contemplated in the proviso on extinction of actions of c. 1492 § 1, which means the canon refers only to actions regarding the status of persons when judgments derived therefrom have definitive effects. On the other hand, any judgments pronounced in processes for the separation of spouses, due to the very nature of the *causa petendi* on which they are pronounced, substantially lack that definitive efficacy. The execution and permanence of the execution of any judgments pronounced depends on the conforming will of the parties freely willing to forgive and forget the past to restore their conjugal life.

Therefore, the juridical phenomenon of separation of spouses is a phenomenon that is always provisional. The indissolubility of the bond and the effects derived from marriage itself, as is the common life of the spouses, always rests on the separation pronounced judicially, the first effect of which is suspension of that unitary conjugal life. Regardless of the cause for which the separation was pronounced, be they perpetual (c. 1152 § 1) or temporary (c. 1153 § 1), those pronouncements are always pending the determining condition of the effect through the manifest will of the spouses to restore conjugal life. It should come as no surprise that the separation of spouses can be decided not only through a judgment pronounced through judicial means, but also through a decree of the diocesan bishop through administrative means (c. 1692 § 1).

Canonical doctrine normally has affirmed that actions based on natural rights are not extinguished; therefore, they do not lapse. Just as natural rights never belong to the sphere of their holders' power to dispose of them, for which there cannot be general and future waivers of these rights, neither are there legitimate means for their extinction apart from those that can proceed from human nature itself. In this regard, the prohibition on the prescription of rights belonging to divine or natural law (c. 199,1°) must be borne in mind. Together with these, the juridical system includes in its prohibition other rights, some intimately linked to natural rights,

such as rights involving the spiritual life of the faithful (c. 199,3°). Others, nevertheless, are subject to the prohibition that they may lapse, due to the authority of canon law, although the prohibition is justified in each case for various reasons. These are rights that can only be obtained through apostolic privilege, rights concerning the certain and unquestionable limits on ecclesiastical circumscriptions, rights to stipends and mass obligations, the right to decree the ecclesiastical office for any office required for the sacred order, and the visitation rights that belong to the legitimate authority in each ecclesiastical circumscription (c. 199,2° and 4°–7°).

Canon 199 provides that these rights cannot lapse. In the commentary on c. 1491 § 1, it is prescription of the actions. From the procedural point of view, c. 199 must be deemed as a prohibition on prescription for the exercise of any actions that are expressed as based on those rights. Once the complaint is admitted in exercise of one of these actions that cannot lapse, the judge must reject ex officio, expressly excluding it from the object of the process, any type of exception that can be interpreted as prescription, and can in no way incorporate it into his decree of the formulation of the issue. Should the exception be presented through dilatory means, it must be pointed out immediately by the judge in order for him to reject it outright, not allowing the incidental matter presented to be handled as a dilatory matter of the case in chief.

4. Distinct from the actions, § 2 of the canon sets forth the procedural principle that exceptions can always be lodged and do not lapse. A concrete example of this relates to the plaint of nullity of the judgment, which lapses in ten years if it is an action, and as an exception never lapses (c. 1621). The reason is clear. It is not a right, like an action, which is exercised to initiate the process, but a right to be exercised in a process already begun by another, to which the party that can file the exception is cited. Procedurally, the defendant is always a party subject to the action of the plaintiff. The defendant's right to defense, which is the exception, lacks the autonomy for spontaneous exercise with its own independence. It is a right the exercise of which depends on another subject exercising an action against its holder. If one has not been called to the process as the defendant, he or she has no opportunity to exercise an exception. The exception only becomes possible in the procedural opportunity that is offered the defendant who has to defend him or her self against the aggression entailed in the exercise of the action. In the process, exceptions, like all defenses, lack an independent and proper time. Their time does not begin until the defendant must adopt a procedural position in his or her defense, which will be the exercise of any exception or exceptions the defendant has against the plaintiff's action exercised in the form of a complaint.

Lastly, the proviso that c. 1492 § 2 makes in favor of c. 1462 could have been avoided. It does not add nor subtract anything from the provision as it is written. Canon 1462 achieves its effect through its own content, as c. 1492 § 2 exists and provides said perpetuity of exceptions

without the need for any reference to the content of c. 1462, which refers solely to the appropriateness, in each process, of filing the exceptions foreseen in the canon. Canon 1462 regulates a procedural issue. Once the process has begun, the defendant must file the exceptions described in this canon. On the contrary, c. 1492, outside of any specific process, states that exceptions can be filed in any process and at any time. The first is a specific norm of procedural appropriateness. The second is a general acknowledgment of the right to object through any exceptions that the defendant finds in his or her favor. Therefore, it is a general norm of perpetual attribution of the right to file exceptions.

1493 Actor pluribus simul actionibus, quae tamen inter se non confligant, sive de eadem re sive de diversis, aliquem convenire potest, si aditi tribunalis competentiam non egrediantur.

A plaintiff can bring several actions simultaneously against another person, concerning either the same matter or different matters, provided they are not in conflict with one another, and do not go beyond the competence of the tribunal that has been approached.

SOURCES: c. 1669 § 1

CROSS REFERENCES: cc. 1411 § 1, 1414, 1460 §§ 1 et 2, 1488 § 2, 1505 § 2,4°, 1514, 1517, 1588, 1611,1° et 3°, 1612 § 3, 1620,8°, 1624, 1628, 1632, 1637 §§ 2 et 3, 1639 § 1, 1642 § 2, 1646, 1656 § 1, 1672, 1673 § 3, 1677 § 3, 1683, 1686, 1690

COMMENTARY

Carmelo de Diego-Lora

1. Procedural doctrine distinguishes *subjective cumulation* of actions from *objective cumulation* of actions. The latter is the one referred to in this canon.

Subjective cumulation of actions gives rise to joint litigation, which can be active or passive, depending on whether there is more than one plaintiff or defendant. In strict terms, what is involved is less a cumulation of actions and more a concurrence of subjects in the same process, whether actively or passively. These cases are referred to as subjective cumulation of actions because of the attribution of the action (or actions) exercised to various subjects, all of whom act according to their juridical power, either to act or to file exceptions.

From this perspective, there is a distinction in the interests of each litigant and what he or she is seeking in the process. From an active position, this leads one to approach the process voluntarily, as the direct effect of shared legitimate interests with more than one holder, each of whom is subject to juridical authority to demand justice according to his or her own interest. Therefore, the complaint is presented as the exercise of actions by various holders who join in the same claim. This subject may have various nuances, as well as contrasts, such as when the object of litigation being claimed is of an indivisible nature. Some of this is mentioned in c. 1637 § 2.

2. Canon 1493 omits any reference to subjective cumulation of actions and proceeds directly to regulation of objective cumulation. It treats the possibility that more than one action can be joined in the same complaint, either against the same defendant or against more than one defendant, if the complaint is against more than one.

Exercising more than one action in one complaint has been said to mean initiating more than one process in one procedure, since each action can generate a process derived from its exercise, even if it involves the same plaintiffs and defendants. Each action maintains its own *argumentum* and generates its own complaint. Thus, it will give rise to particular allegations and specific evidence, as well as cause possible specified exceptions.

Even if each action maintains its own identity within the same procedure, if any of them can be waived, there can be acts of disposition (waivers, transactions, arbitration settlements, acceptances by the defendant, *etc.*) with respect to some, and retention of the instance initiated with respect to others. However, the fundamental procedural relationship connecting the judge to the parties and the parties to each other is common to all actions, without prejudice to that distinct treatment between them. If there are acts of disposition with respect to any cumulated actions during the proceeding, there can be substantial changes to the object of the process, which will be introduced when its content is reduced because fewer petitions are formulated. However, the original identity of this fundamental procedural relationship remains, albeit with variations with respect to the object or objects sought, similar to how the process maintains its original identity even if the terms defined in the dispute are validly modified by a decree pronounced pursuant to c. 1514.

Therefore, it is not entirely correct to maintain that a cumulation of actions originates more than one process in one procedure because, if the original procedural relationship is maintained, the modification of its object is manifested lawfully by the judicial decrees formally approving the acts of disposition by the parties. In this sense, unity of process and procedure can be reconciled with the variety that can be found in the substantial nucleus of the process with respect to the various actions cumulated by the plaintiff in the complaint. This does not destroy the fundamental procedural juridical relationship that results from the complaint, its acceptance by the judge, and the consequent lawful citation of the defendant. Through the modifications of the object of the process, the fact that the parties dispose of any of the actions presented in the complaint, removing them from the original object of the proceeding, does not affect the instance initiated, which is referred to in c. 1517.

3. Canon 1493 allows for the possibility of objective cumulation of actions with considerable breadth, if the same subjective identities of the plaintiff and defendant are present in the same process. Therefore, cumulated actions in the complaint can be varied and found in very

different petitions. This is the only positive requirement established by the canon.

In c. 1414, the criterion established for cumulation of causes is their connection to each other. The principles influencing this norm are the continuity of the cause, the avoidance of contradictory judgments that may affect the same object, and the principle *ne bis in idem*. All these reasons can support the cumulation of causes, so the same tribunal may judge them through the same procedural channel. However, if there is no element connecting causes other than the same plaintiff or plaintiffs and the same defendant or defendants, the justification for cumulation can only be found in the principle of judicial economy. In this situation, the plaintiff is granted the opportunity to cumulate any other possible actions he or she might have in connection with the same defendant, to avoid duplicate or multiple processes.

The canon starts from the identity of the procedural subjects to regulate the objective cumulation of actions. However, this regulation is restrained, because once this juridical power to cumulate actions for a plaintiff with respect to a given defendant is set forth, the canon proceeds to indicate the limitations to which this cumulation is subject.

The first of these limitations is that actions cannot conflict with each other, either in the same or on more than one matter. This is a practical expression of the principle of no contradiction, applied specifically to the process. One plaintiff, based on his or her action, cannot in the same procedural act of the claim request one thing and at the same time, based on another action, ask for the opposite. In that situation, there would be an absence of *fumus boni iuris* (c. 1505 § 2,4°), and the complaint would lack basis, due to that absence of rationality in the argument, which makes the formal instrument of the claim rejectable *in limine litis*.

Undoubtedly, if in one case of cumulation one distinguishes between the principal action and the subsidiary action or actions, this type of cumulation is logical: for example, an action claiming an amount and a subsidiary action ensuring credit due. If actions are truly subsidiary to the principal action, it is difficult to believe that they could be in conflict. It is easier to believe that conflict between actions could arise when there is a cumulated exercise of principal actions in the same complaint. When one considers an act of cumulation of various principal actions, giving rise to a simple plurality of actions, each with its own independence, the actions can be contradictory or appear to conflict. The judge must point this out based on cc. 1493 and 1505 § 2,4° and rule against their admission, because it is a situation in which the complaint must be rejected.

On the other hand, this conflict will not arise if the cumulated actions are treated as subsidiary or conditional actions: if the first is not agreed to, then the judge must decide on the second one, and so forth. Even if allegations and evidence that may support some actions must be

expressed during the same process, the judge or tribunal must resolve the petitions heeding the proposed order of subsidiarity. The judgment will be incongruous if the judge decides to rule on the second or third petition without having first rejected, with due arguments, the previous petitions. In this case, the judge cannot rule *per saltum*, dispensing with the order proposed by the plaintiff when formulating the cumulation of actions subsidiarily in the complaint.

A different problem is presented by an alternative cumulation of actions, when the actions are set forth in petitions, which must be answered in the judgment, and these petitions are presented in such a way that the judge must rule on one of them. With the acceptance of the petitions, it is sufficient for the judicial organ to decide one of them for it to be understood that the action presented as an alternative is rejected. No possibility of conflict arises in these cases because, although these actions are presented to the judge on an equal level, this equality does not exist in the claim itself, which offers the judge an option by which he can admit one of them, with the other being automatically rejected. From the plaintiff's point of view, objective cumulation of alternative actions is presented in the claim but is not the intent of the claimant, who only wants one to be accepted. Unquestionably, an appeal can never be lodged against the judge's choice (because this choice was submitted to judicial discretion), but only because the appellant proves to be prejudiced (c. 1628) by the judgment pronounced. The formulation of the issues in the appeal will not contemplate if the judge should have opted for one alternative or the other, but only if the judgment pronounced in the instance must be upheld or amended in full or in part (c. 1639 § 1).

4. If an objective cumulation of actions is presented, the judge must rule on each issue when they are proposed in simple plurality. As clearly stated in c. 1611,1°, the judgment must give a proper answer to each issue. In these cases, if the judgment answers some issues in the affirmative and others in the negative with respect to the requests set forth, when these requests rest on different actions, partial appeals of the judgment usually take place, and the litigants can have in the appeal a double formal role of appellant and appellee at the same time (c. 1637 § 3).

Within the restrictive norms presented on cumulation of actions, c. 1677 § 3 offers an ideal example, when it requires that the formulation of the issue in the process for nullity of marriage not only must state whether or not nullity is evident, but through which chapter or chapters the validity is being challenged. When there is more than one, each chapter entails the exercise of a different action for nullity, which calls for a response in the judgment, as it will first need specific allegations and the respective evidence from the plaintiff. Thus, c. 1677 § 3 gives notice of a possible objective cumulation of actions exercised with simple plurality. Each action, by being set forth in the formulation of the issues, imposes the requirement that the court rule in this regard. The plaintiff, by formulating this petition

for nullity, based on different actions or juridical causes of action (*chapters*, in the language of the code) has an interest, which must be presumed to be legitimate, in having the marriage declared null for those causes of action. The judgment can incur at least partial incongruence (c. 1620,8°) if there is not a pronouncement on each chapter of nullity of marriage, because each calls for a decision duly argued by the tribunal (cc. 1611,3° and 1612 § 3).

5. The second limitation concerns the competence of the tribunal: none of the actions exercised can go beyond the competence of the tribunal. Therefore, this is in the sphere of relative competence, the original competence of the tribunal that is only limited for reasons of judicial distribution, with this distribution proceeding from competencies, from a factor resulting from territorial limits of competence, so each tribunal in a given territory has the same competencies. In fact, they can have competence for matters outside their territory (c. 1411 § 1), such that, lacking competence in principle, they may acquire it when, once the plaintiff has chosen the competence, the defendant does not file a dilatory objection (cc. 1642 § 2 and 1460 §§ 1 and 2). However, with regard to competence in matrimonial causes, the Signatura and the Tribunal of the Roman Rota are adopting a special proviso, due to fear of fraudulent evasion of law with regard to the selection of the tribunal outside of the provisions in c. 1673, to the point that c. 1488 § 2, among the acts prohibited for advocates and procurators, and subject to legal sanctions, cites removing causes from competent tribunals so they are ruled on by a more favorable tribunal.

In principle, the tribunal that can judge what is greater can also judge what is lesser. The greater causes can only be judged by the tribunals referred to in c. 1405, without prejudice to these tribunals' ability to take over a lesser competence for the purpose of objective cumulation of actions. Lastly, provided that one is dealing with functional competence, as occurs in the appeal and in other recourses (cc. 1624, 1628, 1632 and 1646) as well as in incidental causes due to connection (c. 1588), when the judge or tribunal is predetermined by procedural law, the concept of relative competence is excluded.

Canon 1493 regulates *initial objective cumulation* of actions, which occurs when, in the same complaint, different actions are cumulatively lodged to be judged by the same judge or tribunal, within the same process, between given parties. However, in some situations, there can be *successive objective cumulation* of actions. Canon 1683 is its prototype. This type of cumulation could also arise under c. 1514. It would entail a change of the complaint if the judicial decree pronounced in the case allows the exercise of a new action not lodged in the initial complaint. However, c. 1683 is of more interest when a particular phenomenon of cumulation of a new action or actions for nullity is anticipated for the first time in the appeals proceeding. Even if the tribunal hearing the appeal accepts the accumulated action for the first time in the middle of the appeal,

for its consideration, handling, and ruling, in this way exercising through legal means a *vis attractiva* on the new chapter of nullity, it will do so for the new chapter as a tribunal of first instance.

The increase in competence generated by this latter successive cumulation is a consequence of the effect of the appeal to the higher tribunal, which allows this tribunal to receive causes of nullity that are filed late but refer to the same marriage being challenged, which originates for the competence of the tribunal a diversity of functions for the purpose of competence. If, for causes of nullity alleged in the first instance, it maintains its functional competence to judge at the appeals level, for the cause or causes of nullity alleged for the first time in a subsequent instance, it will have competence in the grade of the first instance, thus creating a new order of competencies for subsequent appeals.

The third limitation on objective cumulation is that some accumulated actions are incompatible with the procedure selected by the plaintiff in the complaint. While this limit on cumulation is not provided in the canon, it is sufficient to cite c. 1690 as an example: causes of nullity cannot be handled through the oral contentious process. Much less could there be a cumulation of a cause of nullity in the complaint of a documentary process when none of the phenomena of c. 1686 is present. If a plaintiff lodges an oral process through the exercise of a given action, the cumulation of an action for separation of spouses cannot be successful if the other party asks that the ordinary contentious process be followed (c. 1656 § 1).

1494 **§ 1. Pars conventa potest coram eodem iudice in eodem iudicio contra actorem vel propter causae nexum cum actione principali vel ad submovendam vel ad minuendam actoris petitionem, actionem reconventionalem instituere.**

§ 2. Reconventio reconventionis non admittitur.

§ 1. A respondent can institute a counteraction against a plaintiff before the same judge and in the same trial, either by reason of the case's connection with the principal action, or with a view to removing or mitigating the plaintiff's plea.

§ 2. A counteraction to a counteraction is not admitted.

SOURCES: § 1: c. 1690 § 1
§ 2: c. 1690 § 2

CROSS REFERENCES: cc. 1369, 1459, 1462–1463, 1492–1493, 1495, 1500, 1514, 1611,1°–2°, 1659–1662, 1668, 1683

COMMENTARY

Carmelo de Diego-Lora

1. The final words of c. 1494 § 1, *actionem reconventionalem instituere*, seem inappropriate, since an action, in itself, is not a counterclaim. A procedural action has its own autonomy to be exercised in any complaint giving rise to the birth of a process, just as it does not lose its own autonomy, if exercised in the form of a counteraction.

There are no particular actions originating counteractions, which are nothing more than a juridical wayto sue, with a specific nature. In a counteraction, the opportunity of being sued is used to claim from the plaintiff something to which one believes him or herself to be entitled. Therefore, a counteraction should not be confused with an action, nor are there actions that in themselves are counteractions. A counteraction is a complaint filed by the respondent, before the same judge and in the same process, against the plaintiff who originated the process with his or her own complaint.

From this perspective, the counteraction plays a role similar to that of the cumulation of actions, with the difference being that cumulation has the same subjects situated, some on the active side and others on the passive side, in the procedural relationship. On the other hand, in a counteraction, the actions are reciprocally implemented, with the respondent

taking the initiative in the exercise of his or her action against the one who previously was only the plaintiff in the process. On the active side and on the passive side of the fundamental procedural relationship, from now on, there will be dual reciprocal juridical positions for each of the litigants. Therefore, the original plaintiff will also be a respondent with respect to the action that the person cited by the plaintiff as the respondent filed against the plaintiff. In turn, the original respondent becomes a plaintiff with respect to the one who originally sued.

2. Consequently, the difference between a counteraction and objective cumulation of actions is so marked that there can be no confusion between the two, despite the fact that the litigants are the same. In a counteraction, the litigants will have dual positions, active and passive at the same time, in the process, which can never occur with objective cumulation. Moreover, a counteraction has a distinct subjective origin, the respondent, while the cumulation arises from the sole will of the plaintiff, who claims to hold all the cumulated actions. In addition, cumulation is presented as a sum of actions, while the counteraction is presented more like a *subtraction* with respect to the action of the plaintiff. Finally, the counteraction has a more reduced sphere of possibilities for exercise. Cumulation starts only from the subjective identity of the plaintiff and respondent (c. 1493), but a counteraction requires objective causes, such as the connection of the action of the respondent with that of the case in chief that has commenced, or which has the purpose of neutralizing or weakening the request formulated by the plaintiff.

In this last respect, the counteraction could be considered a defense to be used by the respondent against the action exercised by the plaintiff, which would operate with some similarity to peremptory exceptions, intended to neutralize or reduce the effects of the plaintiff's petition. However, the differences between counteractions and exceptions are evident. A counteraction is never a defense, but an exercise of action, by which the respondent in turn becomes a plaintiff, and the one who had been the plaintiff becomes the respondent with respect to the action exercised by the respondent. In addition, an exception cannot be filed independently from the action filed by the plaintiff, but the action exercised by the respondent against the plaintiff through the counteraction has its own strength outside of the actions already exercised. It could have been exercised independently of the plaintiff's action and originate a distinct process in which there were only the individual positions of plaintiff and respondent. Moreover, no exception ever changes the initial juridical positions of plaintiff and respondent (cf. cc. 1459, 1462 and 1660). But, a counteraction originates a reciprocal duality of roles in the process, plaintiff and respondent of the original cause, which at the same time correspond to those of counter or successive respondent and plaintiff. Finally, a counteraction is subject to the law of prescription pursuant to the provisions of c. 1492 § 1, while exceptions are by nature perpetual (c. 1492 § 2).

3. The code discusses counteractions in cc. 1494, 1495 and 1463. Canon 1463 regulates the procedure for filing counteractions and their effects on the process that has been initiated. In the rest of book VII, there is no mention of counteractions. Despite the plenary nature of the oral contentious process, one cannot determine at what point the counteraction can be filed if it takes place in the process. Nonetheless, it is surprising that, although counteractions are regulated by only three canons, c. 1463 is separated from the other two and placed after the canons regulating exceptions (for a critical discussion of this order, see commentary on c. 1463).

Canon 1493 § 1 establishes the requirements of the action to be exercised in the counteraction: *a)* it must be filed by the respondent before the same judge and in the same process that the plaintiff initiated; *b)* consequently, maintenance of the same original fundamental procedural relationship between the parties and the judge, albeit substantially modified by a new object of the process which decides directly the compatibility of the simultaneous and reciprocal positions of plaintiff and respondent for both parties to the process; *c)* there must be a legitimate cause that can be the connection of the action exercised as a counteraction, or the action exercised in the counteraction must neutralize or weaken the plaintiff's petition; and *d)* when the canon states *coram eodem iudice in eodem iudicio*, it refers to the requirements of relative competence for every objective cumulation of actions and of the appropriateness of the procedure, for accepting a diversity of cumulated actions (see commentary on c. 1493).

4. Regarding the requirements of the counteraction, those referring to objective causes as the basis for the possibility of a counteraction are highlighted because of their particular interest. Canon 1690 *CIC*/1917, the precedent to the current c. 1493, only allowed the respondent's counteraction when the respondent's action was intended to neutralize or weaken what was asked by the plaintiff in the complaint. This explains why Cabreros de Anta holds that the counteraction "strictly speaking, involves the idea of *compensation* between the petition of the defendant and that of the plaintiff." Moreover, even if there could hypothetically be a connection of causes, "if there is no compensation between both petitions, neither is there any true counteraction."[1]

However, the causal limitation established by c. 1690 § 1 *CIC*/1917 "was practically inoperative. In practice, the counteraction justified by the concept of connected cause came to be widely accepted ... Ecclesiastical tribunals in cases of separation and declaration of nullity of marriage commonly accepted counterclaims from the respondents. Rather than weakening or neutralizing the actions exercised, this practice strengthened

1. M. CABREROS DE ANTA, commentary on c. 1690, in *Código de Derecho Canónico* (Madrid 1972), p. 625.

them, because nullity could be declared both by reason of the case alleged by the plaintiff, and that brought by the respondent, and even of both. The same thing occurred with cases of separation of spouses."[2] In one monograph, these counteractions were noted, which could be understood as violating c. 1669 *CIC*/1917, on which they rested.[3]

The canon of the new *CIC* includes the connection of the cause that justifies the counteraction with the main action that served to initiate the process. In the wording of c. 124 of the preparatory *schema* of the current *CIC*, the phrase *vel propter causae nexum cum actione principali*[4] was included and received without objection by the consultors. It was transferred verbatim to this canon.

Canon 1691 *CIC*/1917 established the widespread application of the counteraction to all contentious causes, except causes of dispossession. It is then understood why the principle was set forth, inasmuch as the *CIC*/1917 thoroughly regulated possessory actions and, with respect to the *actio spolii*, the principle *ante omnia restituendo* was sanctioned in c. 1699 §§ 1 and 2 *CIC*/1917. In contrast, since c. 1500 of the *CIC* on the exercise of possessory actions, refers to the norms of civil law of the location of the thing the possession of which was in dispute, the former canonical norm in this regard is unnecessary.[5]

Canon 1691 *CIC*/1917 excluded criminal cases from the counteraction, unless there was mutual slander. This was based on the old criminal doctrine that held that reciprocal slander is compensated because they are private crimes, and according to the seriousness, there could be partial compensation for one of them, with the penalty imposed being reduced by reason of the more serious one committed. These problems have disappeared from the current *CIC*, which only mentions the crime of slander against the religion or the Church (c. 1369).

5. Paragraph 2 of the canon forbids the *reconventio reconventionis*. Therefore, the plaintiff against whom a counteraction is filed cannot file another counterclaim against the respondent.

The possibilities of filing successive claims must have a limit. Judicial economy and clarity, as well as the due speediness with which the process must progress, prevent late cumulations of actions. In the best of cases, these would slow down the procedure, while in others, these would complicate them and confuse the formulation of the issue, with the resulting confusion with respect to evidence, which can prejudice good judgment. The process cannot become an endless discussion of various issues

2. C. DE DIEGO-LORA, commentary on c. 1494, in *Pamplona Com.*
3. Cf. P.A. PERLADO, "¿Es posible la reconvención en las causas matrimoniales de separación?" in *Revista Jurídica de Cataluña* (1976), pp. 483–504.
4. Cf. *Comm.* 11 (1979), pp. 71–72.
5. Cf. ibid., p. 72.

between litigants, driven by the passion of the dispute and the desire to win at all costs.

However, if the initial plaintiff possesses an additional action other than the one already filed against the respondent who became the plaintiff, the fact that the *CIC* does not allow the plaintiff to again file a counteraction does not prejudice one's rights. This is because the action to be exercised in a counteraction can always be presented in a separate process, without any irreparable prejudice to the entitled party, because of the prohibition.

Moreover, it is appropriate to stress that this supposed counteraction would not entail for the plaintiff anything but an objective cumulation of actions made after the presentation of the complaint, because only in this complaint is this cumulation authorized by c. 1493 with regard to the original cumulation. On the other hand, successive cumulation (see commentary on c. 1493) is only allowed by c. 1683 for causes of nullity of marriage. Even if it is presented in the first instance, it will never take on the form of a counteraction. The governing norm is c. 1683 and not c. 1494. In turn, the change of complaint, resulting from valid amendments of the terms of the dispute, must always be in accordance with c. 1514 and cannot take place through the *reconventio reconventionis*, prohibited by c. 1494 § 2.

The possibility of filing a counteraction does not have only this limitation, legally formulated as a prohibition. The action by which a counterclaim is filed is subject to the rules of relative competence. Moreover, the process initiated by the plaintiff's complaint must be suitable to accept in its processing the action by which there is a counterclaim, as occurs in objective cumulation. In conclusion, the counteraction is only a procedural right of the respondent, which must be exercised in the proper procedural context, determined by the norms of competence and by the suitability of the procedure selected by the plaintiff in the complaint.

Lastly, one must stress the independence of actions exercised in the counteraction and the autonomy they possess to be exercised in another process. This independence of actions will affect the entire process with respect to the claims of the parties and the evidence to be presented, and with respect to the powers of disposition of the various actions within the process, if the actions of the parties are subject to disposition by those who exercised them. The judgment, at the end of the hearing process, must be pronounced on each issue formulated because of that inverse exercise of varied actions, and must determine the obligations that each party must meet (c. 1611,1° and 2°). This will occur even if a decision with a unitary result is pronounced in a compensation case, which will be the effect of how the action of the counterclaiming party has affected the request formulated by the plaintiff in the complaint.

1495 **Actio reconventionalis proponenda est iudici coram quo actio prior instituta est, licet ad unam causam dumtaxat delegato vel alioquin relative incompetenti.**

The counter action is to be proposed to the judge before whom the original action was initiated, even if he has been delegated for one case only, or is otherwise relatively non-competent.

SOURCES: c. 1692

CROSS REFERENCES: cc. 135 § 2, 1415, 1442, 1494 § 1

COMMENTARY

Carmelo de Diego-Lora

1. The first provision contained in the canon (*actio reconventionalis proponenda est iudici coram quo actio prior instituta est*) is the *vis attractiva* possessed by the first action or actions exercised by the plaintiff in the complaint.

In a certain way, this also concludes c. 1494 § 1, when it provides that the action of the respondent against the plaintiff, characteristic of counteractions, can be lodged *coram eodem iudice in eodem iudicio.* However, one might imagine that c. 1494 § 1 would require that a counteraction be subject to the same norms of competence as those governing the conventional action. Canon 1493, established for objective cumulation of actions, requires that none of the actions exceed the competence of the tribunal. Therefore, for the purposes of competence, it is reasonable for it to be understood that the same rule for cumulation of actions be applied for the counteraction, inasmuch as the counteraction is a cumulation of actions, albeit in a reverse and reciprocal sense, before the same judge and in the same process.

For this reason, the requirements for a counteraction must include extension of the competence of the judge who accepted the complaint from the plaintiff and cited the respondent, as well as the suitability of the process initiated to also accept the action (see commentary on cc. 1493 and 1494). In the case of counteractions, since they are successive cumulations, one could turn to the judge who first cited the respondent (c. 1415). However, c. 1495 expressly mentions that competence will be that of the judge before whom the previous action was presented. This norm would require an indication that it would occur provided that it is not prevented by norms of competence—because the counteraction would be excluded when it is subject to norms of absolute or functional

competence—or norms of procedure selected by the plaintiff according to the action exercised by him or her, given that this procedure could be unsuitable for legally accepting the respondent's action.

2. The canon contains a second norm by which the competence of the appointed judge is extended, even if he is assigned for only one cause or is affected otherwise by relative competence. If the assigned judge acts procedurally to hear and judge the cause resulting from the plaintiff's action, he will also hear the counteraction of the respondent, even if this latter action, due to relative competence, is subject, in principle, to another tribunal. It is the same justification of the aforementioned *vis attractiva*, provided that, for the counteraction, the aforementioned rules of absolute and functional competence do not prevent it, and the suitability of the procedure selected by the plaintiff would also have to be added.

Nevertheless, it is somewhat surprising how faithfully c. 1495 has followed the letter and the spirit of c. 1692 *CIC*/1917 in this area. Moreover, in practice, delegation has become the means used by bishops to exercise judicial power in their dioceses. From this point of view, there would be no reason for this surprise. However, a power characteristic of a bishop can be limited by universal legislation of the Church, especially when it is exercised by someone else, and the *CIC* has legal texts that can set forth the opinion that the possibility of delegation by the diocesan bishop to others to judge judicial causes is not retained in the new Code (for news on the doctrinal disagreement in this regard, see commentary on c. 1419: 4).

This matter is so important as to justify some normative act at the maximum level, or at least an authentic interpretation that dispels any doubts regarding the continuance in the new Code of the judicial power delegated by the bishop in his diocese. Canon 1692 of the *CIC*/1917 fit perfectly in the context offered by c. 201 § 2 of the same Code. However, there is no canon in the new *CIC* that corresponds to c. 201 § 2 *CIC*/1917. On the other hand, c. 1419 § 1 sets forth the principle that, barring an express exception in law, the judge of the first instance of the diocese is the diocesan bishop, who may exercise judicial power by himself or through others, *secundum canones qui sequuntur.* The canons that follow (1419 et seq.) refer exclusively to the vicarious exercise of judicial power, without reference to possible delegation. Canon 135 § 3 and the canons that follow pay considerable attention to the delegation of executive power. On the other hand, in canon 135 § 2, referring to judicial power, the delegation is limited to the power to perform preparatory acts for a decree or judgment.

Therefore, the power to delegate the exercise of judicial power is reserved in the *CIC* to the Roman Pontiff exclusively. In the case of diocesan bishops, the exercise of that power devolves upon them and the various vicarious organs recognized by the *CIC* for that function in the various dioceses, and even in broader territorial circumscriptions, when those tribunals are organized according to the norms of c. 1423.

CAPUT II
De actionibus et exceptionibus in specie

CHAPTER II
Actions and Exceptions in Particular

1496 **§ 1. Qui probabilibus saltem argumentis ostenderit super aliqua re ab alio detenta ius se habere, sibique damnum imminere nisi res ipsa custodienda tradatur, ius habet obtinendi a iudice eiusdem rei sequestrationem.**

§ 2. In similibus rerum adiunctis obtinere potest, ut iuris exercitium alicui inhibeatur.

§ 1. A person who advances arguments, which are at least probable, to support a right to something held by another, and to indicate an imminent danger of loss unless the object itself is handed over for safekeeping, has a right to obtain from the judge the sequestration of the object in question.

§ 2. In similar circumstances, a person can obtain a restraint on another person's exercise of a right.

SOURCES: § 1: c. 1672 § 1
§ 2: c. 1672 § 2

CROSS-REFERENCES: cc. 124–128, 1452, 1491, 1497–1499, 1621, 1645–1648

COMMENTARY

Miguel Ángel Ortiz

The detailed regulation of actions and exceptions in particular that was found in the *CIC*/1917 (cc. 1672–1700) has been reduced to the five canons of this chapter. The reason for the reduction is that those actions and exceptions were rarely presented before ecclesiastical tribunals.[1]

1. Cf. *Comm.* 11 (1979), p. 67; on the revision of the present chapter, ibid., pp. 67–81.

Consequently, some of them have been omitted, such as those regarding new work and damage feared (cc. 1676–1678 *CIC*/1917), which, if lodged in the future, could be redirected to c. 1496 or to possessory actions. Actions for nullity of acts (cc. 1679–1683 *CIC*/1917) have also been dispensed with, which actions can follow the course of cc. 124–128 on nullity of juridical acts in general and c. 1621 on the plaint of nullity against a judgment. Moreover, cc. 125–126 contain the basis for lodging rescissory actions, which were dealt with in cc. 1684–1686 *CIC*/1917. Lastly, *restitutio in integrum* (discussed in cc. 1687–1689 *CIC*/1917) is only contemplated in the *CIC* as a means of challenging judgments that have become adjudged matters (cc. 1645–1648). In addition to these references—as stressed in the *CIC* revision projects, when they were reducing the subject matter of the canons under discussion—the general rule of c. 1491 may be applied: "Every right is reinforced not only by an action, unless otherwise expressly provided, but also by an exception."[2]

This chapter only discusses preventive remedies and contains a reference to the civil system for possessory actions. Preventive actions directly or indirectly attempt to avert the danger posed to future execution, either by the existence of a declarative process or by the time it takes for a declarative process to be substantiated. That risk is known as *periculum in mora*. In addition to the risk that may result from fraudulent maneuvers performed by the other party that could endanger future execution, the party presenting the preventive action must demonstrate a particular *fumus boni iuris*. The plaintiff's mere affirmation is insufficient. Another motive for preventive actions is the guaranty occasionally required of the party presenting the action (c. 1499).

Preventive actions are documentary, subsidiary and provisional. They exist as a function of a subsequent, contingent executive measure, which normally concerns the ownership of the thing or right subject to the preventive measure. They prepare for that execution and are extinguished with the declarative process. Moreover, in some way, they constitute a furthering of the execution and could be classified as *tertium genus* of the contentious process, together with the declarative and the executive process.[3] For these reasons, and because preventative actions are ordered without necessarily a hearing from the other party because they tend to counteract this party's possible fraudulent activity, the judge must take prudent care when ordering preventive measures.[4]

In fact, the judge enjoys broad discretion. His actions must be inspired by the juridical criteria contained in other provisions of the *CIC*, which may be interpreted as parallel locations (cf. c. 17). In particular, the

2. Cf. *Comm.* 11 (1979), pp. 67, 74, 76, 77.
3. Cf. F. CARNELUTTI, *Diritto e processo* (Naples 1958), p. 355.
4. Cf. A. DE LA OLIVA-M.A. FERNÁNDEZ, *Derecho procesal civil*, III (Madrid 1990), pp. 300ff.

safekeeping of sequestered assets shall be guided according to the canons regarding the administrative of assets (cf. cc. 1281, 1284, 1286, 1289).[5]

Preventive actions can be exercised: (1) to verify that one has a right to something in the control of another; (2) to verify that one has a right that another is holding and enjoying; or (3) to demonstrate that one holds credit pending compliance. The first and third of these cases are called *sequestration*, because they concern things. The second case is called *prohibition* or *interdiction* of the exercise of the right; in doctrine, this is referred to as improper sequestration.[6] This canon discusses the first two situations: sequestration of the thing and prohibition or interdiction.

Canon 1496 contemplates the two requirements for the sequestration action: the *fumus boni iuris* ("advancing arguments, which are at least probable") and the *periculum in mora* ("danger of loss unless the object itself is handed over for safekeeping"). Thus, it is necessary to determine the certainty of the right claimed by the party exercising the action, as well as the impossibility that the damage feared could be repaired another way (cf. c. 1498).

Canon 1672 *CIC*/1917 contained § 3, which established "provided that the public good seems to demand the sequestration of a thing and the prohibition of the exercise of a right, the judge may decree them ex officio, mainly at the instance of the promoter of justice or the defender of the bond." The members of the revision commission chose to delete it, recognizing the provision of c. 53 of the *schema* then under consideration (current c. 1452), on the ex officio act of the judge in causes concerning the public good.

Doctrine considered that the preventive action of sequestration discussed in this canon could be initiated ex officio or at the instance of a party, in the case in chief or in an incidental matter.[7] The judge ruled *audita altera parte* with a decree or judgment.

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5. Cf. C. DE DIEGO-LORA, commentary on cc. 1496–1498, in *Pamplona Com.*
6. Cf. F. ROBERTI, *De processibus*, I (Rome 1956), p. 608; F.X. WERNZ-P. VIDAL, *Ius Canonicum*, VI (*De processibus*) (Rome 1949), p. 258.
7. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica iuxta Codicem Iuris Canonici*, I (Rome 1950), p. 395; F. ROBERTI, *De processibus*, cit., p. 610.

1497 **§ 1. Ad crediti quoque securitatem sequestratio rei admittitur, dummodo de creditoris iure satis constet.**

§ 2. Sequestratio extendi potest etiam ad res debitoris quae quolibet titulo apud alias personas reperiantur, et ad debitoris credita.

§ 1. The sequestration of an object is also allowed for the security of a debt, provided there is sufficient evidence of the creditor's right.

§ 2. Sequestration can also extend to the assets of a debtor which, on whatever title, are in the keeping of others, as well as to the loans of the debtor.

SOURCES: § 1: c. 1673 § 1
§ 2: c. 1673 § 2

CROSS-REFERENCES: cc. 1496, 1498–1499

COMMENTARY

Miguel Ángel Ortiz

This canon discusses the sequestration that tends to ensure collection of a debt. In the Spanish version of the *CIC*, this is called *attachment*. Doctrine refers to this action as *sequestratio conservativa*, in contrast to the *sequestratio iudicialis* of c. 1496 § 1 and the restraint of c. 1496 § 2.[1]

The attachment that secures a debt has the same requirements as the sequestration discussed in the preceding canon: sufficiently proven right of the creditor, amount and ownership of the equally certain debt, preventive measure necessary to guarantee the debt, damage that cannot be remedied any other way. However, in this canon, the preventive action is not directed at the thing in dispute or the exercise of which is restrained, as in the preceding canon. Instead, it is directed at a thing, normally a sum of money, which is taken as a substitute for the debt one seeks to guarantee. Moreover, since it is a measure that is more executory than the purely preventive actions of c. 1496,[2] the *fumus boni iuris* must appear with a stronger entitlement. It is required not only that the creditor advance "probable arguments" (c. 1496), but that the right be sufficiently proven (*dummodo de creditoris iuris satis constet*), which in turn constitutes a title with less force than that of c. 1673 § 1 *CIC*/1917, the precedent to c. 1497.

1. Cf. F.X. WERNZ-P. VIDAL, *Ius Canonicum*, VI (*De processibus*) (Rome 1949), p. 257; in the opposite sense, E. FERNÁNDEZ REGATILLO, *Institutiones Iuris Canonici*, II (Santander 1951), p. 273.

2. Cf. A. DE LA OLIVA-M.A. FERNÁNDEZ, *Derecho procesal civil*, III (Madrid 1990), p. 136.

In fact, the text of the *CIC*/1917 required that the right of the creditor be truly verified (*dummodo de creditoris iure liquido constet*). In the revision phase, the force of the title was intentionally reduced. Canon 108 of the *schema* asked that the creditor's right *manifesto constet*, an expression that was replaced with the phrase *satis constet.*[3] Canon 1673 § 1 *CIC*/1917 added *in fine* that "the norm of c. 1923 § 1" must be retained, that is, the executor must try to "cause the losing party as little damage as possible."

Paragraph 2 of this canon allows the judge to extend the attachment "to the assets of the debtor that by any title are found in the control of other persons, as well as to other debts of the debtor." The text does not state "the sequestration *is* also extended ..." but rather that "it *can* be extended." Therefore, the judge, at his discretion, shall decide whether it is appropriate to extend the attachment to those assets.

In civil procedural doctrine, the attachment has three phases: 1) finding the assets that must be attached (money, marketable securities, jewels, credit marketable in the act, profits and revenue, real and personal property, salaries and pensions, credit non-marketable in the act, business and industrial establishments); 2) levying or allocating the assets (the disposition of which is removed from the holder); 3) the means of guaranteeing the levy (mainly, judicial deposit, judicial administration, and preventive annotation).[4] The normal means of guarantee, especially in canon law, is the judicial deposit of the debtor's assets in the hands of a third party, the bailee.

Consequently, the judge will appoint a bailee of the attached assets at the request of the parties or, if they do not reach an agreement, ex officio (cf. c. 1675 *CIC*/1917). The bailee, who may be the debtor,[5] shall act observing the norms regarding the administration of assets (cf. cc. 1281 et seq.), with no less diligence than that employed in the safekeeping of one's own assets. When it was decided that it was unnecessary to repeat the regulation of the position of the bailee found in c. 1675 *CIC*/1917 in the new code, it was understood that the judge must rule regarding who will be entrusted with the object of the sequestration, in the extremely rare cases that arise.[6]

Although it was understood that it could be lodged through an incidental or principal matter, doctrine after the code considered the principal matter as the main rule.[7] The judge would make his ruling as a decree or judgment for the debtor and any interested third party.

3. Cf. *Comm.* 11 (1979), p. 73.
4. Cf. A. DE LA OLIVA-M.A. FERNÁNDEZ, *Derecho procesal civil*, III, cit., pp. 139ff.
5. Cf. A. DE LA OLIVA-M.A. FERNÁNDEZ, *Derecho procesal civil*, III, cit., p. 157.
6. Cf. *Comm.* 11 (1979), p. 74.
7. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica iuxta Codicem Iuris Canonici*, I (Rome 1950), p. 398; F. ROBERTI, *De processibus*, I (Rome 1956), p. 613.

1498 **Sequestratio rei et inhibitio exercitii iuris decerni nullatenus possunt, si damnum quod timetur possit aliter reparari et idonea cautio de eo reparando offeratur.**

The sequestration of an object and restraint on the exercise of a right can in no way be decreed if the loss that is feared can be otherwise repaired, and a suitable guarantee is given that it will be repaired.

SOURCES: c. 1674

CROSS-REFERENCES: cc. 1446, 1492, 1496–1497

COMMENTARY

Miguel Ángel Ortiz

The subsidiary and provisional nature of preventive actions means that, if there are other means of repairing the damage or guaranteeing its reparation, the sequestration or attachment must not be decreed. In the same way, if an alternative guarantee arises once the preventive nature is decreed, the preventive action must be suspended or revoked.[1]

This canon makes these provisions in emphatic terms: "in no way" can sequestration or restraint be decreed, unless it is the only means available for avoiding damage or guaranteeing reparation. A similar provision appears in identical language in *CIC*/1917, c. 1674, which also understood that the preventive measures contained in the preceding canons were extraordinary and subsidiary.

Subsequent to the Code, doctrine has determined that sequestration ceases due to: (1) the lapse of the term established when it was granted; (2) the realization of the condition on which its grant depended; (3) the disappearance of the cause or need that induced the judge to grant it. *Conservative* sequestration (c. 1497) ceases with satisfaction of the credit, while *judicial* sequestration (c. 1496) ceases with resolution of the dispute.[2]

The *CIC* discusses extinction of actions in c. 1492. With respect to prescription, the reference to civil law in cc. 197–199 must be taken into account. In any event, the life of the preventive action depends on the

1. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica iuxta Codicem Iuris Canonici*, I (Rome 1950), p. 392.

2. Cf. F. DELLA ROCCA, *Istituzioni di diritto processuale canonico* (Turin 1946), p. 67; F.X. WERNZ-P. VIDAL, *Ius Canonicum*, VI (*De processibus*) (Rome 1949), p. 266.

vicissitudes of the principal action it precedes, accompanies, or follows, depending on whether it is filed before, with (cf. c. 1493), or subsequent to it, once the process of the principal action is initiated and before it becomes an adjudged matter.

The extraordinary nature of these preventive actions arises from the principle that inspired the drafting of several canons: the desire to have disputes resolved peacefully (cf. c. 1446). It is not that the process and the measures established in the code are contrary to the spirit of canon law[3]; if they were, the law would not contemplate them, and there would be no process or preventive measures. However, both are means that can contribute to the reestablishment of injured or threatened justice. In view of a hypothetically unjust situation that would harm the supreme law of the Church, the *salus animarum*, as an *ultima ratio* one turns to, allows reestablishment of the *communio* and defense of rights in the Church.

3. Cf. M.J. ARROBA, *Diritto processuale canonico* (Rome 1993), p. 229.

1499 **Iudex potest ei, cui sequestrationem rei vel inhibitionem exercitii iuris concedit, praeviam imponere cautionem de damnis, si ius suum non probaverit, resarciendis.**

The judge who grants the sequestration of an object, or the restraint on the exercise of a right, can first impose on the person to whom the grant is made an undertaking to repay any loss if the right is not proven.

SOURCES: *SN* can. 192

CROSS-REFERENCES: cc. 1496–1498

COMMENTARY

Miguel Ángel Ortiz

The possibility of suffering damage is the basis of the preventive action. To prevent damage from being suffered, the judge may grant sequestration, restraint or attachment. However, the preventive action also may cause damage to the respondent, against whom the sequestration is pronounced. Therefore, the plaintiff must demonstrate sufficient title and claim the proximity of the damage for a judge to grant a preventive measure.[1]

When the principal action is substantiated, the appropriateness of the preventive measure becomes evident, if the judicial organ handles the principal action. However, the reverse can occur. That is, there may be cases in which, although a title was demonstrated that the judge found sufficient for granting a preventive measure, the claim is unfounded and results in damage to the respondent, whose assets or credit were sequestered, or who was prohibited from exercising a right. In that case, an obligation may arise to repay the damages caused. In anticipation of that compensation, this canon contemplates the possibility of requesting a guarantee from the party lodging the preventive measure.

Consequently, following the practice in civil systems,[2] this canon offers the judge the possibility of demanding a bond from the party, who in turn requests a bond from the respondent. In this way, the preventive action falls under the responsibility of the party who initiates it.

1. Cf. C. DE DIEGO-LORA, commentary on c. 1499, in *Pamplona Com.*
2. Cf. A. DE LA OLIVA-M.A. FERNÁNDEZ, *Derecho procesal civil*, II (Madrid 1990), p. 329.

The bond imposed on the plaintiff compensates for possible damages incurred on the respondent, but it does not justify the preventive action. Thus, even if the plaintiff spontaneously offers a guarantee, if the judge does not find the title claimed or the *periculum in mora* to be sufficient, he will not grant the preventive measure requested.

The 1976 *Schema* contained three canons regarding the admission of actions guaranteeing the security and support of the spouse and children in the matrimonial process.[3] These canons had not been in the *CIC*/1917. No room was made for those three canons (cc. 112–114 of the *schema*), although their theoretical appropriateness was acknowledged (*ipsis normae videntur optimae theoretice loquendo*), mainly because the Church lacks the means to effectively urge the furnishing of guarantees constituting their object. It was stressed that the objective of the canons is covered by c. 1071 § 1,3°: "except in the case of necessity, no one is to assist without the permission of the local ordinary … a marriage of a person bound by natural obligations towards another party or children, arising from a previous union."

3. Cf. *Comm.* 11 (1979), pp. 74ff.

1500 Ad naturam et vim actionis possessoriae quod attinet, serventur praescripta iuris civilis loci ubi sita est res de cuius possessione agitur.

In matters concerning the nature and effect of an action for possession, the provisions of the civil law of the place where the thing to be possessed is situated, are to be observed.

SOURCES: —

CROSS REFERENCES: cc. 6 §2, 22, 98, 154, 197–199, 231, 1059, 1105 §2, 1269–1270, 1290, 1381, 1491, 1492,1°, 1515, 1672, 1692 §§2–3, 1714

COMMENTARY

Miguel Ángel Ortiz

The second actions the *CIC* considers are possessory ones, which are closely related to preventive actions.[1] However, in the case of possessory actions, the legislator has not reduced the ample regulations contained in the *CIC*/1917 (cc. 1695–1700), as was done with preventive actions, but has chosen to refer the subject to civil law.[2]

Canon law has fine-tuned the tendency to extend the scope of possessory protection to situations unknown to Roman law.[3] In the first place, by recognizing the possession of intangible assets and broadening the Roman doctrine of *quasi possessio*, canon law gradually extended possessory protection to all types of rights susceptible to continued exercise. This extension of protection is embodied in the *exceptio* and the *actio expolii*, granted even in favor of the holder. In both aspects, particularly with respect to the *actio expolii*,[4] canon law contributed to the completion of the possessory theory and considerably influenced civil legislation.[5]

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1. Cf. F. CARNELUTTI, *Diritto e processo* (Naples 1958), pp. 359ff.
2. Cf. J. MIÑAMBRES, *La remisión de la ley canónica al derecho civil* (Rome 1992), pp. 180–183.
3. Cf. F. ROBERTI, *De processibus*, I (Rome 1956), p. 653.
4. Cf. A. TRABUCCHI, *Istituzioni di Diritto civile* (Padova 1993), p. 422; C. DE DIEGO-LORA, commentary on c. 1500, in *Pamplona Com.*
5. Cf. J. CASTÁN TOBEÑAS, *Derecho civil español, común y foral*, II-1 (Madrid 1987), p. 629; A. TALAMANCA, "Possesso. Diritto canonico," in ISTITUTO DELLA ENCICLOPEDIA ITALIANA (G. TRECCANI), *Enciclopedia Giuridica*, XXIII (Rome 1990).

Ownership is protected with the petitory action, which is intended to claim ownership of a right to property or of a real right in general. Possession, on the other hand, with the possessory action, is intended to recover an asset of which one has been deprived or to avoid the annoyances and dangers that encumber an asset or the exercise of a right.

In civil doctrine, there is controversy regarding how to determine the juridical nature of possession, whether it concerns the consideration thereof as a right, a simple fact or a juridically-protected factual state.[6] Based on this distinction, a distinction is made occasionally in the treatment reserved for true possession and mere holding. Only the former will have the *animus possidendi* that, together with the *corpus* (the actual relationship with the thing or right), make possible the exercise of possessory actions.[7] In any event, in the *CIC* 1917, "not only possession, but also mere holding, confers possessory actions or exceptions" (c. 1694 *CIC*/1917). The Spanish Civil Code also equates possession and holding, because it grants possessory actions to the possession on one's own behalf or as the owner, as well as to possession as distinct from ownership, and civil possession as well as natural possession or mere holding, devoid of the *animus dominantis* (cf. articles 446 Civil Code and 1651 law of Spanish Civil Lawsuits).[8]

Consequently, possessory actions (known as possessory remedies or injunctions) protect against a disturbance of the possession, without ruling on the right to underlying possession. The possession defended by these actions is independent of the right to possess.

Unlike petitory actions, possessory actions are not for the purpose of control of a thing or quasi-control of a right, but possession or quasi-possession of the thing or right. Due to the object, possession concerns material things or rights (in this latter case, it is quasi-possession). Because of the manner or intent with which it is possessed, it can be juridical (or civil) or natural (mere holding). Because of the nature, classic defects of possession were designated with the terms *vi* (due to violence or dispossession, physical or spiritual), *clam* (due to hidden conspiracy) and *precario* (which begins to be unjust when the possessor refuses to give the thing to the owner who is claiming it). Then, as a function of the subject, it can be in good or bad faith.[9]

Possessory actions can be of three types, depending on the state of the threat to possession: to achieve, retain, or recover possession (the *CIC*/1917 discussed each of them separately, cc. 1693, 1659, and 1698[10]).

6. Cf. J. CASTÁN TOBEÑAS, *Derecho civil...*, cit., pp. 640 ff.
7. Cf. A. TRABUCCHI, *Istituzioni di Diritto civile*, cit., p. 415.
8. Cf. J. CASTÁN TOBEÑAS, *Derecho civil...*, cit., pp. 640ff.
9. Cf. M. CABREROS DE ANTA, commentary on ch. VI, tit. V, sect. I, part I, book IV, in *Código de Derecho Canónico* (Madrid 1957), pp. 642ff; F. ROBERTI, *De processibus*, cit., p. 653.
10. Cf. F. ROBERTI, *De processibus*, cit., pp. 654ff.

The first is based on an entitlement that allows access to the possession of an asset that at present is not enjoyed. The second tends to maintain the situation of the factual possession. The third, called dispossession, seeks from the judge restitution of a thing or right that was possessed and of which the party was, in his or her opinion, unjustly deprived. It requests that the previous factual situation be reestablished, by specifically adducing the previous possession. The injunction to achieve possession is similar to petitory actions, because it is based not on a factual possessory situation but on an entitlement by which one is attempting to achieve possession.[11]

Throughout the history of the Church, possessory injunctions have been frequent, mainly concerning benefices. By drastically reducing the benefice system, it was foreseen that possessory actions would practically disappear, which is why it was decided to admit a generic reference to civil law. The 1976 *schema* reserved an entire chapter for possessory actions. However, when revising that text in 1978, the members of the *coetus* decided not to delete all references to possessory injunctions, because they did not seem to be sufficiently protected with the generic reference of c. 1491, but to refer en bloc to civil law.[12]

Canon 1500 specifies that the civil law "of the place where the thing to be possessed is situated" is to be observed: the applicable law of the *locus rei sitae*, to which the ecclesiastical judge will turn to determine the nature, as well as the effects, of the possessory action. The requirements established by civil law for the exercise of the action to be recognized must be taken into account: mainly, good faith at the beginning or throughout possession. Excluding protection from mere holding may be controversial in systems that do not equate it with true possession. Perhaps that comparison can be saved—and consequently avoid the vulnerability of holding—adducing the validity of the former law pursuant to c. 6 § 2: "to the extent that the canons of this Code reproduce the former law, they are assessed in the light also of canonical tradition."[13] Criminal protection at times found in civil law (when punishing usurpation, invasion of another's property, or disturbance of peaceful possession) seems to be left outside of the reference. Lastly, the *CIC* refers to unlawful possession of the episcopal office and the respective sanction (cf. cc. 154 and 1381).

As for the rest, the reference to civil norms is subject to the limits contained in c. 22 (see commentary). Those norms are canonized "in so far as it is not contrary to divine law, and provided it is not otherwise stipulated in canon law." In addition to this reference to civil legislation on

11. Cf. M.J. ARROBA, *Diritto processuale canonico* (Rome 1993), pp. 230ff; J.L. ACEBAL, commentary on c. 1440, in *Salamanca Com.*
12. Cf. *Comm.* 11 (1979), pp. 78–80.
13. In that sense, F. ZANCHINI, "Possesso. Diritto canonico," in *Enciclopedia del Diritto*, XXXIV (Milan 1985), p. 539.

possessory actions, cc. 197–199 contain another reference to civil legislation on prescription, one of which is *continued possession* (see commentaries on cc. 197–199, particularly when they refer to the good faith of the possessor; cf. also cc. 1269–1270, 1492,1°). Good faith is interrupted, in the ordinary process, with the joinder of the issue (c. 1515).

The *CIC* also establishes references to civil law[14] in c. 98 (with respect to guardianship), c. 1105 § 2 (on the proxy mandate for marriage), c. 1290 (regarding contracts), c. 1714 (on arbitral transactions and settlements), cc. 231 and 1286,1° (on employment and social benefits), and cc. 1059 and 1672 (on the merely civil effects of marriage). Canon 1692 §§ 2 and 3 foresee the possibility of resolving causes on the separation of spouses in the civil forum.

14. Cf. J. MIÑAMBRES, *La remisión de la ley canónica al derecho civil*, cit., p. 194.

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